

**ILLEGALITY IN ACTION:
A COMPARATIVE ANALYSIS OF THE US' FEDERAL AND THE EU'S EVOLVING
POLITICAL SYSTEMS REGARDING IMMIGRATION POLICY AND HUMAN
RIGHTS LAW**

by

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Unprecedented levels of migration occur due to ever-increasing globalization. Because of this, countries that once promoted welcoming immigration policies now face immense challenges to reform their immigration laws. Some of these attempts, however, appear to actively target and discriminate against ethnic minorities whilst undermining central political authority and jurisdiction over immigration policy. To better understand the issue of controversial immigration policies within the Western World, this paper will place two case studies into their proper legal context. The goal of this paper is to address the issue of why centralized authority is being undermined by member-states, and how illegality, with reference to immigration policy, occurs and is allowed to continue.

The two case studies, Arizona's SB1070 and France's Repatriation Policy of 2010, are analyzed because in both political systems, the US federal system and the EU's more loosely organized political entity, these two member-states circumvented central authority to address the issue of illegal immigration. With an examination of each political entity's laws, legal precedent, the controversial policies and arguments relating to the policies, this paper will establish the credibility or illegality of each state-level immigration policy. Only through a comprehensive legal interpretation of immigration policy and human rights law will we better understand the issue's controversial nature.

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1.0 INTRODUCTION

As globalization causes unprecedented levels of migration, countries that promoted welcoming immigration policies now face immense challenges to reform their immigration laws. In order to place the issue of new immigration policies into proper legal context, the two case-studies – the state of Arizona versus the United States’ (US) federal government, the French government versus the European Union (EU) – will be compared to best address the issue of how and why centralized authority is being undermined by member-states, and how illegality, with reference to unconstitutional immigration policy, occurs and is allowed to continue.

In both political systems, member-states circumvented central authority to address the issue of immigration. Arizona, in 2010, passed SB1070, a stringent law rewriting how immigration law enforcement is addressed. This new state law demanded immigrants always possess their alien registration documents and for police to seek reasons to suspect immigrants are in the United States illegally¹.

¹ CNN, April 23, 2010 “What does Arizona’s immigration law do?” February 7, 2011.
http://articles.cnn.com/2010-04-23/politics/immigration.faq_1_arizona-immigration-law-reform-sb1070?_s=PM:POLITICS

This law demands immigrants to “carry their alien registration documents at all times and requires police to [seek out any] reason to suspect the [immigrants are] in the United States illegally”.

Similarly in 2010, the French government initiated a program to deport immigrants incapable of finding employment after a 3-month minimum residency². This action, initially thought uncontroversial and abiding EU law, quickly exploded as French government circulars indicated that the closing of 300 immigrant camps and expulsion of 1,000 individuals targeted one group: ROMA³. The French government's action was deemed a breach of the EU's ban on ethnic discrimination, resulting in the European Commission's desire to launch infringement proceedings⁴. Despite the issue's extensive debate, the controversial French policy continues to remain in effect.

This paper will place SB1070 and the French repatriation policy within their proper legal and political context so as to better understand how and why illegal, unconstitutional immigration laws are undermining centralized authority. By using EU and US founding treaties, legal precedent, legal opinions and arguments to determine the laws' legitimacy and legality, this paper will devise the legality of each actor's policy.

In order to accomplish this objective, this paper will be written into three chapters. The first two chapters will focus on different case studies, the first chapter involving the American case study of Arizona's SB1070; the second, France's deportation policy and the EU. These first two chapters will introduce their respective situations, describe the specific legislation or government action, and analyze the laws within the legal framework of their greater political organization. The third chapter will comprise a comparative analysis between the American and European case studies and devise a policy goal for both systems to address these continuing

² BBC. "BBC News - France Sends Roma Gypsies Back to Romania." *Bbc.co.uk*. BBC - Homepage, 20 Aug. 2010. Web. 19 Feb. 2012. <http://www.bbc.co.uk/news/world-europe-11020429>

³ Traynor, Ian. "Roma Deportations by France a Disgrace, Says EU | World News | The Guardian." *Guardian.co.uk*. The Guardian, 14 Sept. 2010. Web. 19 Feb. 2012. <http://www.guardian.co.uk/world/2010/sep/14/roma-deportations-france-eu-disgrace>

⁴ Ibid 3

controversial situations. In both systems, political actors are targeting a specific minority, Hispanics or ROMA. Both ethnicities represent easy political targets, incapable of responding at the higher level of political organization or raising enough votes to raise adequate awareness to the situation. Because of this, an examination of each country's immigration law and policy must be conducted with regards to human rights law to ensure these ethnic minorities are not being actively, and disproportionately, discriminated against. Only through a comprehensive legal interpretation of immigration policy will there be a better understanding of these issues' controversial nature.

2.0 FIRST CHAPTER – CASE STUDY: ARIZONA V UNITED STATES

2.1 FIRST SECTION: BACKGROUND OF SB1070 – ESTABLISHING AZ MOTIVE

Throughout US history, immigration remains a controversial political issue. Today, some Americans, concerned with the lack of employment opportunities, want the federal government to place stricter regulations upon illegal immigrants. Seizing upon the federal government's inability to stop illegal immigration, political actors, such as Arizona's Republican-led state legislature and Governor Jan Brewer, took the matter of addressing immigration reform into their hands.

Prior to SB1070, the state of Arizona previously dealt with immigration reform. In attempts to pass similar stringent immigration legislation in 2006 and 2008, Arizona's Republican-led state legislature was twice defeated by vetoes from then Democratic Governor Janet Napolitano⁵. To work around the political stalemate of the gubernatorial veto power and enact immigration control, the state congress passed the Legal Arizona Workers Act (LAWA), also referred to as the "Employer Sanction Law", in 2007. This law prohibited any business

⁵ Archibold, Randal, NY Times. "Arizona Enacts Stringent Law on Immigration" April 23, 2010.

<http://www.nytimes.com/2010/04/24/us/politics/24immig.html?ref=us>

"Among other things, the Arizona measure is an extraordinary rebuke to former Gov. Janet Napolitano, who had vetoed similar legislation repeatedly as a Democratic governor of the state before being appointed Homeland Security secretary by Mr. Obama."

within the state to hire illegal residents willingly and knowingly⁶⁷. Before 2010, this law, deemed, “The most comprehensive and restrictive of such efforts to pass effective legislation,” quickly became controversial and attracted legal suits against it⁸. Despite legal action taken by the Obama Administration, US Chamber of Commerce and several civil rights groups claiming the law to be unconstitutional, the Supreme Court (SCOTUS) upheld the Arizona law⁹. Though

⁶ Horne, AZ Attorney General Tom. “Legal Arizona Workers Act,” 2012. <https://www.azag.gov/legal-az-workers-act>

“The Legal Arizona Workers Act, as amended, prohibits businesses from knowingly or intentionally hiring an “unauthorized alien” after December 31, 2007. Under the statute, an “unauthorized alien” is defined as “an alien who does not have the legal right or authorization under federal law to work in the US.” The law also requires employers in Arizona to use the “E-Verify” system (a free Web-based service offered by the federal Department of Homeland Security) to verify the employment authorization of all new employees hired after December 31, 2007.”

⁷ Perkins Coie, Legal Consultants. “Governor Signs Legal Arizona Workers Act” July 9, 2007. <http://www.perkinscoie.com/governor-signs-legal-arizona-workers-act-07-09-2007/>

“Employers are prohibited from *intentionally* or *knowingly* employing an ‘unauthorized alien,’ the Act’s term for an individual who lacks the right or authorization under federal law to work in the US. The definition of ‘intentionally’ is taken from Arizona’s criminal code, meaning that the employer’s objective is to engage in the conduct or cause the result proscribed by the law – here, employing unauthorized aliens. ‘Knowingly’ is defined consistently with federal law regarding unlawful employment of aliens and includes hiring someone for employment without complying with federal requirements for verifying employment authorization (the I-9 form).”

⁸ Lofstrum, M.; Bohn, S.; Raphael, S. PPIC, “Lessons from the 2007 Legal Arizona Workers Act” March 2011. http://www.ppic.org/content/pubs/report/R_311MLR.pdf

“Federal legislators have been unable to pass comprehensive immigration reform, resulting in... several states... enacting their own. The most comprehensive and restrictive... so far is Arizona’s 2007 Legal Arizona Workers Act (LAWA). It attempts to reduce the reliance on unauthorized workers by mandating the use of a national identity and work authorization verification system called E-Verify, and by imposing sanctions on employers who continue to hire such workers. A recent PPIC report supports the contention that current federal employer sanctions, which do not mandate the use of the E-verify system, have been ineffective.”

⁹ Savage, David. LA Times, “Supreme Court upholds Arizona immigration law targeting employers” May 26, 2011. <http://articles.latimes.com/2011/may/26/nation/la-na-court-immigration-ruling-20110526>

“The Supreme Court gave a...boost to proponents of stricter state laws against illegal immigration by upholding Arizona’s “business death penalty” for employers who repeatedly hire undocumented workers. The 5-3 ruling gives more states a green light to target those who employ illegal immigrants. And because it rejected the contention that the state was interfering with the federal government’s authority over immigration, the decision also encouraged supporters of Arizona’s even more controversial immigration law...The ruling said Arizona could deny employers a business license after a second violation of its Legal Arizona Workers Act of 2007. Also upheld was Arizona’s requirement that employers check with the federal E-Verify program before hiring workers. Chief Justice John G. Roberts Jr. said Arizona’s licensing law “falls well within the confines of the authority Congress chose to leave to the states,”

retaining its controversial nature, the 2007 legislation was deemed successful by the state of Arizona as the, “mandating E-Verify in Arizona achieved the intended goal of reducing the number of unauthorized immigrants in the state”¹⁰.

With a judicial victory establishing LAWA as within the state’s authority and not violating federal supremacy, in addition to evidence proving a diminishment of the Hispanic population, not necessarily the unauthorized worker population, in Arizona, the state government viewed it possessed the legitimacy to introduce further immigration policy reform. In order to better address the issue of illegal immigration, without facing the threat of gubernatorial veto, as the former Democratic Governor was chosen as President Obama’s Secretary of Homeland Security in 2008, Arizona’s Republican state government passed SB1070 on 23 April 2010, (originally entitled the Support Our Law Enforcement and Safe Neighborhoods Act) a bill that demands all immigrants carry their identification papers while granting police the power to ask anyone they suspect of being an illegal immigrant to show their legal status papers¹¹. Arizona

rebuffing challenges from the U.S. Chamber of Commerce, the Obama administration and civil rights groups.”

¹⁰ Ibid 8

“Our research indicates that mandating E-Verify in Arizona achieved the intended goal of reducing the number of unauthorized immigrants in the state. However, it also had the unintended consequence of shifting unauthorized workers into less formal work arrangements. Specifically, we find that the population of non-citizen Hispanic immigrants—a high proportion of whom are unauthorized immigrants—in Arizona fell by roughly 92,000 persons, or approximately 17 percent, because of LAWA over 2008–2009. This decline is greater than those observed in comparison states, and was not caused by the recent recession. Regarding the employment outcomes of the unauthorized, LAWA reduced employment opportunities in the wage and salary sector for unauthorized immigrants, with many of these workers shifting into self-employment. Our estimates suggest that wage and salary employment of Hispanic non-citizens dropped by approximately 56,000 while non-citizen Hispanic self-employment increased by about 25,000...We found no strong evidence that LAWA, as of yet, either harms or benefits competing authorized workers.”

¹¹ Ibid 5

passed this law almost along party lines, with no Democratic support and one Republican state senator voting against it¹²¹³.

SB1070, passed with Governor Brewer's approval, was organized in order for Arizona to address the ineptitude of the Federal government regarding immigration policy. The last major change in federal governmental immigration policy dates back to the Immigration and Nationality Act (INA) of 1952; since 1965 it has only been amended, never officially replaced by updated, contemporary congressional initiatives¹⁴. For decades, immigration reform remained on the docket, always failing to pass in Washington. In recent history, attempts at revising current immigration policy failed in Congress, both in 2006 and 2007¹⁵. Both measures attempted to strengthen border security and establish the DREAM Act, a policy granting legal status and a path to citizenship for illegal immigrants and their children who already reside and work in the US¹⁶. Both bipartisan legislative bills, however, failed to either reach consensus between the congressional houses, or a vote. Because of the continued inability of Congress to pass

¹² Rossi, Donna. KPHO.com, "Immigration Bill Takes Huge Step Forward" 13 April 2010
<http://www.kpho.com/story/14782265/immigration-bill-takes-huge-step-forward-4-13-2010>

"House Republicans advanced the measure on a 35-21 party-line vote. The Senate approved the bill in February but has to agree to changes made in the House before sending it to Gov. Jan Brewer."

¹³ Arizona State Legislature, "BILL STATUS VOTES FOR SB1070 - Final Reading" 2010
<http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/sb1070.sfinal.1.asp&SessionID=93>

¹⁴ US Citizenship and Immigration Services (USCIS). "Immigration and Nationality Act" 6 June 2011.
<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD>

"The Immigration and Nationality Act, or INA, was created in 1952... The McCarran-Walter bill of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of immigration law."

¹⁵ Kondracke, Mort. RearClearPolitics.com, "Immigration Failure Gives Senate Profile in Political Cowardice" 2 July 2007
http://www.rearclearpolitics.com/articles/2007/07/immigration_failure_profile_in.html

¹⁶ Ibid 15

substantial and modern immigration reform, many states, such as Arizona, believed something needed to be done.

Instead of awaiting federal, centralized authority, action, the state of Arizona, according to Governor Jan Brewer, exercised its right to address the terribly disruptive influences of illegal immigration and crime facing the state¹⁷. SB1070 establishes itself in that it rewrites the way in which immigration laws and their enforcement are addressed. Applicable to everyone in Arizona, police can ask anyone they suspect of being an immigrant, whether they are illegal aliens, naturalized citizens or citizens by birth, for their legal documents¹⁸.

The passing of this state legislation led to significant action taken by the federal government and numerous external actors, such as fellow state governments, human rights groups and international governments denouncing the law. Additionally, judicial injunctions were placed upon Sections 2(b), 3, 5(c) and 6 of SB1070 by a federal district court prior to the bill entering into effect. In order to address all components of the controversial SB1070 through a legal lens, this paper will examine the Constitution in order to establish which branch of government retains jurisdiction over immigration law. This is important for if immigration reform is classified as an enumerated power, a power granted to the federal government, the state of Arizona would have acted illegally and the law should not stand. If immigration policy's jurisdiction is not specified and is instead interpreted, by the federal government, as a centralized policy due to the Supremacy clause, this paper will then examine SCOTUS legal precedent so as

¹⁷ Brewer, Governor Janice. "Statement by Governor Jan Brewer" April 23, 2010.
http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf

"We in Arizona have been more than patient waiting for Washington to act. But decades of federal inaction and misguided policy have created a dangerous and unacceptable situation...Border-related violence and crime due to illegal immigration are critically important issues to the people of our state, to my Administration and to me, as your Governor and as a citizen."

¹⁸ This law demands immigrants to "carry their alien registration documents at all times and requires police to [seek out any] reason to suspect the [immigrants are] in the US illegally" (CNN, 2010).

to better understand which body of government traditionally and legally possesses jurisdiction and supremacy. This section is key to understanding the American federal system and placing the debate circulating SB1070 into proper context.

The proceeding section will examine with the language of the law and the legal ramifications dealt upon SB1070. In addition, this section will utilize language from proponents for and against the law to better analyze SB1070. Furthermore, this section will address why Arizona chose to pass such a law in 2010, and what reasons – political, economic or other – prompted such a bill. Through legal analysis, this paper will discern that the Arizona state legislature enacted a policy that violated the supremacy of the American Constitution, circumventing the federal government’s jurisdiction over immigration policy.

2.2 SECOND SECTION: IMMIGRATION POLICY LEGAL AUTHORITY

The US Constitution does not express with clear and active intent which level or department of government retains jurisdiction over immigration policy. The seven articles of the Constitution deal with the delineation of powers for the legislature, executive and judicial branches along with other measures to establish and authorize legal government; within these articles, only one section remotely references immigration: Article 1, Section 8¹⁹. This section of Article 1, referred to as the Naturalization Clause, stresses Congress’ jurisdiction over, and ability to grant, naturalization, giving Congress the ability to establish citizenship²⁰. Though only a small provision compared to the current

¹⁹ Epstein, Lee, and Thomas G. Walker. *Constitutional Law for a Changing America: Rights, Liberties and Justice*. 6th ed. Washington, D.C.: CQ, 2007. Print. p792

“The Congress shall have power to... establish an uniform Rule of Naturalization.”

²⁰ Ibid 19

extent of immigration law, this clause, along with the Supremacy clause, establishes the basis for the clear delineation and jurisdiction of immigration policy: the ‘Plenary Power’ Doctrine, the executive and legislative branches’ ability to regulate immigration without judicial intervention²¹.

The Plenary Power Doctrine, a judicial orchestration of federal power, developed because the Constitution did not specify the jurisdiction of immigration policy to a branch of government, except the aforementioned power of ‘naturalization’ to Congress²². In order to address the lack of political and judicial authority over immigration, the federal government’s executive and legislative branches developed the nation’s immigration policy. SCOTUS, in its establishment of the Plenary Power Doctrine, did not seek judicial authority over immigration policy because it recognized that decisions regarding immigration better fit the powers and responsibilities of elected officials, of the federal executive and legislative branches, than those of appointed judges, persons not held accountable by the electorate, for six reasons: the Political Question Doctrine, Lack of Capacity, Uniformity, Efficiency, Immigration Enforcement not being a Punishment, and History (*Stare Decisis*)²³. These reasons,

²¹ Feere, Jon. “Plenary Power: Should Judges Control US Immigration Policy?” *Center for Immigration Studies*. February 2009. text p.1

²² Ibid 21

²³ Ibid 21, p1-2

“Political Question Doctrine: Federal Courts...refuse to hear cases that involve policy questions best resolved by elected officials...logic is that elected officials are more accountable to the public and can best represent public’s interests...also [they] are more likely to understand the political implications of their decisions. The connection between immigration and foreign affairs, national security, and similar policy fields has often resulted in courts invoking this doctrine.

Lack of Capacity: Courts are designed to adjudicate legal issues and simply lack the institutional capacity to make political judgments. Immigration law is inherently political because it’s created entirely within the political branches...

Uniformity: The specifics of immigration...regulated by federal-level political branch policies. If lower courts become too involved in this process and craft unique statutory interpretations... strong likelihood of an inconsistent immigration system that varies from one jurisdiction to another. This would...be in direct violation of the Constitution, which requires a “uniform rule of naturalization”.

Immigration Enforcement NOT Punishment: SCOTUS has held that due process protections apply when an individual faces punishment in the form of deprivation of life, liberty, or property, but that an alien being returned to his homeland or denied entry to the United States is not being punished and therefore cannot expect courts to grant him these protections.

particularly uniformity and *stare decisis*, were judicial justifications for establishing immigration regulation as a political and not a judicial decision.

In order to establish the federal government's supremacy and jurisdiction over American immigration policy, this paper will explore SCOTUS precedent relating to immigration law so as to better comprehend immigration legal history before analyzing and judging SB1070. The process of examining legal precedent regarding immigration policy begins with the establishment of Plenary Power.

Immigration in the US became a more obvious and controversial political issue about a century ago, leading to landmark rulings by SCOTUS to establish the federal government's political branches as the regulators and enforcers of immigration policy. One of the first significant immigration rulings was *Chae Chan Ping (CCP) v. United States [1889]*. SCOTUS examined the case, also known as the "Chinese Exclusion Case," of a Chinese laborer who was refused re-entry into the US²⁴. Presiding over Mr. Ping's case, SCOTUS unanimously upheld the labourer's exclusion and recognized the federal government's inherent power to exclude non-citizens, despite such a power not being granted

History: The great weight of legal authority is in support of judicial deference to the political branches on the issue of immigration. The concept of *stare decisis*...ensures the plenary power doctrine cannot easily be abandoned."

²⁴ Ibid 21, p3

This case surrounded the issue of a Congressional law passed in 1882 that prevented all future immigration of Chinese laborers into the US. In 1887, Chae Chan Ping, a Chinese immigrant residing in the US who left in 1887 for a brief trip to China, was denied re-entry into the country. Despite the 1882 legislation containing a provision that granted the ability to leave and return to previously admitted Chinese laborers, such as Mr. Ping, this provision was discontinued by a new Congressional act in 1888 during Mr. Ping's return journey back to the US. Thus, upon his attempt to re-enter the US, he was denied entry. SCOTUS upheld his exclusion by recognizing the inherent power of the federal government to exclude non-citizens. The Court decided:

"That the government of the United States through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. (*Chae Chan Ping v. United States [1889]*)"

in the Constitution²⁵. This case established SCOTUS' interpretation of immigration law: the political branches of government possess the authority to exclude aliens as they see fit.

Immigration law precedent expanded three years later with *Nishimura Ekiu v. United States* [1892]. SCOTUS built upon precedent established in *CCP* with its outright rejection of an alien's right to appeal the executive branch's immigration decisions in court²⁶. In *Nisuimura Ekiu*, a Japanese woman was denied entry into the US because of being deemed a "public charge," by a federal immigration officer²⁷. SCOTUS refused any claim of denied due process because it held that immigration enforcement is not a punishment and that alien deportation or refusal to entry is not a punishment, thus aliens are not entitled to a day in court²⁸. Additionally, SCOTUS recognized the federal government's jurisdiction and stated the immigration officer acted under the authority to deny entry as granted by an act of Congress, and that denied entry is not a violation of due process as long as exclusions and deportations act within the confinements expressed by an act of Congress²⁹.

²⁵ Ibid 24

"Most significantly, the Court held that decisions by the 'legislative department' to exclude aliens are 'conclusive upon the judiciary'."

²⁶ Ibid 24

²⁷ Ibid 24

"A citizen of Japan, arrived in the United States by boat, claiming that she was to meet up with her husband. Ekiu did not know the husband's address and carried only \$22. For various reasons the immigration officer did not believe Ekiu and denied her entry under a statute that directed immigration officers to deny admission to anyone likely to become a public charge."

²⁸ Ibid 24

"Ekiu appealed her case up to the Supreme Court arguing that complete judicial defence to immigration decisions made by executive branch immigration officers amounted to a denial of due process. The Court disagreed. It held that the statute that empowered the immigration officials to make admission decisions also entrusted the final fact-finding to these officials."

²⁹ Ibid 21, p4

"The Court explained:

'The final determination of those facts may be entrusted by Congress to executive officers... a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted [including SCOTUS]'. (*Nishimura Ekiu v. United States* [1892])"

Essentially, SCOTUS confirmed its understanding that the judicial branch's responsibility was to not 'second-guess' the political questions and decisions made in immigration decisions.

SCOTUS furthered its interpretation of due process limits in *Fong Yue Ting v. United States* [1893]. Here, SCOTUS held that: "[it is the] power of Congress... to expel and exclude aliens... from the country, may be exercised... [by] executive officers"³⁰. The understanding of Congress' and executive officers' powers regarding immigration policy and its enforcement, in tandem with the continued belief that deportation is not a punishment, led SCOTUS to state that due process protections of the Constitution are not applicable to immigration cases³¹. Such precedent diminished non-citizen legal, and illegal, residents' claims to due process and their ability to defend themselves in court. Heretofore, these three precedents, in addition to *Shaughnessy v. US ex rel. Mezei* [1953], founded the political branches' Plenary Power Doctrine on immigration and represent principles not yet overturned³².

In fact, it took almost a century for SCOTUS, in its ruling on *Landon v. Plasencia* [1982], to find that aliens, who continuously work and are presently permanent residents of the US, should be protected by the Due Process Clause of the 5th Amendment in relating to

³⁰ Ibid 29

³¹ Ibid 29

"The Court also held that:

'The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.' (*Fong Yue Ting v. United States* [1893])"

³² Ibid 21, p6

Shaughnessy v. US ex rel. Mezei [1953] – established that a non-citizen facing exclusion was not entitled to due process whatsoever, even if the result was an indefinite detention and expulsion; SCOTUS determined that the courts cannot retry the determination of the Attorney General.

immigration cases³³. By taking a hundred years to recognize and grant non-citizen legal residents with similar legal rights to those of citizens, instead of being recognized similarly to illegal residents in the eyes of the law, demonstrates the culture and stringent nature of this country's immigration history.

Adding to the precedent that established the federal government's authority to develop and enforce immigration policy, further precedent and legislation clarify the jurisdiction of immigration policy and the role of states in regards to enforcing immigration law. Aforementioned, SCOTUS ruled the federal government possesses broad and exclusive power to regulate and enforce immigration policy, preempting any state and local laws that attempt to do so due to the Supremacy Clause³⁴. An example of federal supremacy, the case of *Hines v Davidowitz* [1941], SCOTUS held that:

“The regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of Congress or treaty is supreme; and the law of the state... must yield to it... states cannot...conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. (*Hines v Davidowitz*, 312 U.S. 52 [1941])”³⁵

Even with established supremacy over immigration as granted to the federal government by SCOTUS and the Constitution, federal immigration policy does allow states and localities to independently regulate the employment of illegal aliens through licensing, enforce the criminal

³³ Ibid 21, p10

³⁴ Price, Susan. *OLR Research Report* “State versus Federal Power to Regulate Immigration” 14 November 2007. <http://www.cga.ct.gov/2007/rpt/2007-R-0621.htm>
Supremacy Clause (Article 6, Clause 1 of the US Constitution) invalidates and preempts state laws that interfere with or are contrary to Federal law.

³⁵ Ibid 34

provisions of the Immigration and Nationalities Act (INA), and check the status of anyone detained or arrested, even for minor crimes³⁶³⁷³⁸.

Moreover, in specific circumstances state and local law enforcement officers and agencies can perform additional duties relating to immigration law enforcement³⁹. In fact, INA Section 1357 (c) subsection 287 (g) allows local law enforcement agencies to check the immigration status of anyone arrested, even minor offenses, through the State Department's database⁴⁰. This program remains different to SB1070 in that this program, initiated by federal law and supported by the Obama Administration, applies only to persons already incarcerated whilst SB1070 grants Arizona state and local police the ability to determine the immigration status of persons before arrest and incarceration⁴¹. Thus, despite the defined federal supremacy over immigration policy and the limited capacity state and local law enforcement agencies can enforce federal immigration policy, Arizona still acted outside the authorized 287(g) program and SB1070 remains controversial and works against federal supremacy and precedent.

³⁶ Ibid 34

“‘Licensing’ encompasses: ‘lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions’ of federal law” (H.R. Rep. 99-682, 1986 USCAN 5649, 5662)

³⁷ Ibid 34

States and localities may enforce the criminal provisions of the Immigration and Nationalities Act (8 USC 1101, *et seq.*)

“Section 1252 (c) grants states and local law enforcement ability to arrest and detain aliens illegally present in US who have prior felony convictions.”

³⁸ Ibid 34

“States and local law enforcement efforts cannot impose new or additional penalties upon criminal immigration law violators”

³⁹ Ibid 34

INA Section 1357 (c) subsection 287 (g) states that “the U.S. Attorney General is permitted to enter agreements with states and localities to permit their law enforcement officers to perform additional duties relating to immigration law enforcement.”

⁴⁰ Chicago Tribune, “Immigration: A state or Federal Power?” 13 July, 2010.

http://articles.chicagotribune.com/2010-07-13/news/ct-oped-0713-byrne-20100713_1_immigration-status-arizona-law-obama

⁴¹ Ibid 40

2.3 THIRD SECTION: LEGAL ANALYSIS OF THE LAW

2.3.1 First Subsection: Debate over SB1070's Constitutionality

In order to determine the constitutionality and legitimacy of SB1070 after establishing the federal government's jurisdiction and supremacy regarding immigration policy, this section will investigate SB1070 and legal arguments and decisions concerning the law. In order to establish a legal analysis of SB1070, this section will begin with the ruling of SCOTUS. Per the power of Judicial Review, SCOTUS' ruling is the constitutional understanding of an issue or policy area until another court case challenges state level immigration policy. Listed below are the four controversial sections of SB1070:

Section 2(b):

“For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town [of] this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c) . . . A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona non-operating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.”⁴²

Section 3:

“In addition to any violation of Federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)”⁴³

⁴² Judge Paez. The Ninth Circuit Court of Appeals, *State of Arizona et al. v United States*. 2011. 11 April 2011. http://cdn.ca9.uscourts.gov/datastore/general/2011/04/11/10-16645_opinion.pdf p4815

Section 5(c):

“It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.”⁴⁴

Section 6:

“[A] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States.”⁴⁵

This section will first begin with an analysis of SCOTUS’ ruling on SB1070 and then conduct an independent analysis of the Arizona law, deeming SCOTUS’ ruling incomplete and that all controversial elements of SB1070 must be preempted by the federal government.

SCOTUS, on 25 June 2012, handed down its opinion regarding SB1070 in *Arizona et al v US*. SCOTUS held that:

“The Federal Government’s broad, undoubted power over immigration and alien status rests, in part, on its constitutional power to, “establish an uniform Rule of Naturalization,” Art. I, §8, cl. 4, and on its inherent sovereign power to control and conduct foreign relations, see *Toll v. Moreno*, 458 U. S. 1, 10”⁴⁶.

Additionally, SCOTUS defines the scope and duty of federal immigration law, such as the requirement of aliens entering the country to register with the federal government and to carry “proof of [their] status”⁴⁷. With these responsibilities, however, SCOTUS declared that the federal government still retains the power “to preempt a state law” as granted by the Supremacy

⁴³ Ibid 42 p4829-30

⁴⁴ Ibid 42 p4833

⁴⁵ Ibid 42 p4840

⁴⁶ 567 U. S. ____ (2012) p1

⁴⁷ Ibid 46 p1,2

“Federal law specifies categories of aliens who are ineligible to be admitted to the United States, 8U. S. C. §1182; requires aliens to register with the Federal Government and to carry proof of status, §§1304(e), 1306(a); imposes sanctions on employers who hire unauthorized workers, §1324a; and specifies which aliens may be removed and the procedures for doing so, see §1227. Removal is a civil matter, and one of its principal features ARIZONA v. UNITED STATES Syllabus is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens. It also operates the Law Enforcement Support Center, which provides immigration status information to federal, state, and local officials around the clock.”

Clause⁴⁸. With the power of preemption, the federal government can remove state law from statute, as state law must make way for supreme federal jurisdiction, if one of two circumstances are met: “States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance,” in that Congress has removed any ability for the state to act in such a policy area, or where a federal interest is “so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”; or if the state law is preempted by federal law⁴⁹.

In analyzing SB1070, SCOTUS found Section 2(b) to not presently violate the supremacy clause and that it could work in tandem with federal immigration policy. Despite agreeing with earlier federal judicial rulings regarding SB1070, as set forth by the Ninth Circuit Court of Appeal regarding the decision to preempt Sections 3, 5(c) and 6 of SB1070, SCOTUS ruled it is too early to predict whether Section 2(b) violates the Constitution or is preempted by federal supremacy⁵⁰. SCOTUS believes that, “The mandatory nature of the status checks does not interfere with the federal immigration scheme” for, “Consultation between federal and state officials is an important feature of the immigration system... Congress has encouraged the

⁴⁸ Ibid 46 p2

“The Supremacy Clause gives Congress the power to preempt state law. A statute may contain an express preemption provision, see, e.g., *Chamber of Commerce of United States of America v. Whiting*, 563 U. S. ___, ___, but state law must also give way to federal law in at least two other circumstances. First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. See *Gade v. National Solid Wastes Management Assn.*, 505 U. S. 88, 115. Intent can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it” or where a “federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230. Second, state laws are preempted when they conflict with federal law, including when they stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U. S. 52, 67.”

⁴⁹ Ibid 48

⁵⁰ Ibid 46 p2,3

“It was improper to enjoin §2(B) before the state courts had an opportunity to construe it and without some showing that §2(B)’s enforcement in fact conflicts with federal immigration law and its objectives.”

sharing of information about possible immigration violations §§1357(g)(10)(A), 1373(c)”⁵¹. Due to its interpretation that the 1357(g) program is an overarching program, SCOTUS argues SB1070 fulfills the state’s requirement to enforce federal immigration policy at the state and local level for they will consult with the federal government regarding the residency status of those detained. This perception of the 1357(g) program conflicts with Congress’ original intent and potentially opens the door for racial profiling to occur. Additionally, SCOTUS’ understanding of 1357(g) state level authorized programs failed to address a key component of authorizing such provisions, a requirement that will later be examined in the independent legal analysis.

Additionally, SCOTUS included a warning in its own remarks about its removing the injunction on Section 2(b). SCOTUS declared that, “It is not clear at this stage and on this record that §2(B), in practice, will require state officers to delay the release of detainees for no reason other than to verify their immigration status”⁵². This potential for the law to be used for reasons other than check the status of those believed to be involved with criminal activity in any way is dangerous. Furthermore, if this law were used as the sole reason for detaining persons, it could incite instances of racial profiling, which is unconstitutional and taught to Arizona law enforcement officers as unacceptable⁵³⁵⁴. SCOTUS believes that a specific reading of Section 2(b) will not lead to numerous interpretations of enforcing the law and that, with no conclusive

⁵¹ Ibid 46 p3

⁵² Ibid 46 p4

⁵³ Ibid 46 p3,4

“[Law enforcement] officers may not consider race, color, or national origin “except to the extent permitted by the United States [and] Arizona Constitution[s]”; and §2(B) must be “implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.”

⁵⁴ Ibid 46 p4

SB1070 could “disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.”

evidence to the contrary, it is difficult to prove Section 2(b) establishes racial profiling and violates the equal protection clause⁵⁵. Despite this faith in the potential for Section 2(b), SCOTUS included that their opinion on the matter is not final until there is conclusive evidence that will determine Section 2(b)’s constitutionality⁵⁶.

SCOTUS’ analysis of the additional controversial Sections, 3, 5 and 6, iterates these components of SB1070 are, “preempted by federal law”⁵⁷. Sections 3 and 5 reiterate federal law at the state level and are thus preempted by the Supremacy Clause⁵⁸. Additionally, SCOTUS ruled that

⁵⁵ Ibid 46 p4

According to SCOTUS, “If the law only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives.”

⁵⁶ Ibid 46 p4

“Without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that conflicts with federal law. Cf. *Fox v. Washington*, 236 U. S. 273, 277. This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”

⁵⁷ Ibid 46 p2

⁵⁸ Ibid 46 p2,3

“(a) Section 3 intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. In *Hines*, a state alien-registration program was struck down on the ground that Congress intended its “complete” federal registration plan to be a “single integrated and all-embracing system.” 312 U. S., at 74. That scheme did not allow the States to “curtail or complement” federal law or “enforce additional or auxiliary regulations.” *Id.*, at 66–67. The federal registration framework remains comprehensive. Because Congress has occupied the field, even complementary state regulation is impermissible.

(b) Section 5(C)’s criminal penalty stands as an obstacle to the federal regulatory system. The Immigration Reform and Control Act of 1986 (IRCA), a comprehensive framework for “combating the employment of illegal aliens,” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U. S. 137, 147, makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers, 8 U. S. C. §§1324a(a)(1)(A), (a)(2), and requires employers to verify prospective employees’ employment authorization status, §§1324a(a)(1)(B), (b). It imposes criminal and civil penalties on employers, §§1324a(e)(4), (f), but only civil penalties on aliens who seek, or engage in, unauthorized employment, e.g., §§1255(c)(2), (c)(8). IRCA’s express preemption provision, though silent about whether additional penalties may be imposed against employees, “does not bar the ordinary working of conflict pre-emption principles” or impose a “special burden” making it more difficult to establish the preemption of laws falling outside the clause. *Geier v. American Honda Motor Co.*, 529 U. S. 861, 869–872. The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on unauthorized employees. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

Section 6 produces “an obstacle to federal law,” as it, “attempts to provide state officers with even greater arrest authority, which they could exercise with no instruction from the Federal Government,” which is a provision and power not devised by Congress in the federal immigration system⁵⁹.

The language of Section 2(b), however, seems to contest with SCOTUS’ analysis regarding this controversial component of SB1070. With conflicting wording and ambiguity between sentences as well as varying levels of rigor with which to establish the credibility of someone’s legal status in the state, it is difficult to imagine there not being various understandings of implementation and certain aspects of the law being enforced more broadly than others. Furthermore, the standards Arizona established in Section 2(b) re-iterate federal law at the state level, and by the federal power of preemption Section 2(b) must be removed from statute.

In order to demonstrate how all the controversial sections of SB1070 are unconstitutional, this section’s independent legal analysis will focus primarily on Section 2(b) as well as the three additional controversial sections of the law. In accordance with SCOTUS’ ruling, Section 3, 5 and 6 of SB1070 do not possess conflicting language and work in conjunction with federal immigration policy, as they re-iterate federal law at the state level, or pose an obstacle to federal supremacy as previously outlined.

⁵⁹ Ibid 46 p3

“By authorizing state and local officers to make warrantless arrests of certain aliens suspected of being removable, §6 too creates an obstacle to federal law. As a general rule, it is not a crime for a removable alien to remain in the United States. The federal scheme instructs when it is appropriate to arrest an alien during the removal process. The Attorney General in some circumstances will issue a warrant for trained federal immigration officers to execute. If no federal warrant has been issued, these officers have more limited authority. They may arrest an alien for being “in the United States in violation of any [immigration] law or regulation,” for example, but only where the alien “is likely to escape before a warrant can be obtained.” §1357(a)(2). Section 6 attempts to provide state officers with even greater arrest authority, which they could exercise with no instruction from the Federal Government. This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform an immigration officer’s functions. This includes instances where the Attorney General has granted that authority in a formal agreement with a state or local government. See, e.g., §1357(g)(1). Although federal law permits state officers to “cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States,” §1357(g)(10)(B), this does not encompass the unilateral decision to detain authorized by §6.”

Because of these reasons, as outlined by SCOTUS, these sections are unconstitutional and were properly preempted by federal law.

The language of Section 2(b), however, remains a matter of concern. SCOTUS found that this section's language worked in tandem with federal provisions, but upon further investigation the first and final sentences, in face value reading and basic language analysis, establish a looser, more ambiguous standard of interpreting and executing SB1070 for law enforcement officers than the more rigidly and unambiguously written second and third sentences. Reading these sentences at face value, as conducted by the Ninth Circuit Court of Appeals, depicts the conflict of language established by the Arizona state legislature in their composition of this law. For example, the second sentence, unlike its predecessor, contains unambiguous language such as the all encompassing and mandatory "any" and "shall," as well as the definitive phrase "determined before... release"; this contrasts the first sentence's ambiguous language, which stated "reasonable attempts... when practicable"⁶⁰. The state of Arizona argues that Section 2(b) does not require officers to determine the immigration status of every arrested person, and that the language of the second sentence works in tandem with first sentence if there is reasonable suspicion^{61 62}. However, this face value reading, in addition to the Ninth Circuit

⁶⁰ Ibid 42 p 4815

The two sentences described are as follows:

Sentence 1: "For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town [of] this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation." (Ariz. Rev. Stat. Ann. § 11-1051(B) (2010); Judge Paez, 4815)

Sentence 2: "Any person who is arrested shall have the person's immigration status determined before the person is released" (Ariz. Rev. Stat. Ann. § 11-1051(B) (2010); Judge Paez, 4815)

⁶¹ Ibid 42 p4816

"Thus Arizona argues its officers are only required to verify the immigration status of an arrested person before release if reasonable suspicion exists that the person lacks proper documentation".

⁶² Dever, Sheriff M., Amicus Curiae Brief. p12-13 2 September 2010

<http://cdn.ca9.uscourts.gov/datastore/general/2010/10/25/amicus.brief15.pdf>

Court of Appeals' analysis, determines that the text does not support the state's interpretation of SB1070⁶³.

The third and fifth sentences of Section 2(b) prove to be the most interesting and confusing to analyze at face value. The third sentence establishes the requirements of determining someone's status before releasing him or her, while the fifth provides several forms of identification that provide a presumption of someone's legal documentation⁶⁴. As orchestrated in Judge Paez's interpretation of this language, these sentences of the same section propose the implementation of two different and unrelated standards of verifying residency statuses⁶⁵. The former proposes verifying identities with the federal government, as pursuant to INA standards, while the latter describes several forms of

"Under Arizona rules of statutory construction, courts generally have "a duty to interpret statutes in a manner that does not render the statute meaningless" and should "avoid rendering any of its language mere surplusage." *John C. Lincoln Hospital and Health Corp. v. Maricopa County*, 208 Ariz. 532, 541, 96 P.3d 530, 539 (Ariz. Ct. App. 2004); *In re Aaron M.*, 204 Ariz. 152, 154, 61 P.3d 34, 36 (Ariz. Ct. App. 2003). The district court's interpretation of the second sentence of Section 2(B) violates this rule. Requiring law enforcement officers verify the immigration status of each and every arrestee renders the word "arrest" in the first sentence 7 Case: 10-16645 09/02/2010 Page: 12 of 21 ID: 7462216 DktEntry: 44-2 meaningless and is pure surplusage because the first sentence clearly provides that reasonable suspicion of unlawful presence is required for verification of an arrestee's immigration status. However, reading the second sentence to mean that reasonable suspicion is required and that verification must only be completed prior to the release of the arrestee does in fact give meaning to all the words (specifically "arrest") in both the first and second sentences of Section 2(B). Therefore, the district's court interpretation was improper and the proper interpretation is that the second sentence must be read in conjunction with the first."

⁶³ Ibid 42 p4817

"Reasonable suspicion requirement in first sentence does not modify the plain meaning of the second sentence."

⁶⁴ Ibid 42

The two sentences described are as follows:

Sentence 3: "The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c)" (Ariz. Rev. Stat. Ann. § 11-1051(B) (2010); Judge Paez, 4815)

Sentence 5: "A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona non-operating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification." (Ariz. Rev. Stat. Ann. § 11-1051(B) (2010); Judge Paez, 4815)

⁶⁵ Ibid 42 p4817

identification that provide an acceptable presumption of someone's legal documentation. Though the standard of accepting presumptions of one's legal documentation re-iterates the federal government's standard as outlined by the REAL ID Act of 2005⁶⁶, the inconsistency between these sentences within SB1070 appears to undermine the legitimacy of both sentences and could create a double standard for implementation. Furthermore, the Ninth Circuit Court of Appeals' understanding of Section 2(b)'s language requires law enforcement officers to verify the immigration status of all arrestees before their release with the federal government, regardless of whether or not reasonable suspicion exists that said arrestees are undocumented immigrants⁶⁷. Though, as already discovered in Section 2 of this chapter, INA establishes that incarcerated persons will have their identity confirmed; thus federal law, as guaranteed by the Supremacy clause, preempts this component of SB1070⁶⁸.

The specifics of Section 2(b), particularly the first sentence, in which a law enforcement officer can ask for anyone's identification, appears in violation of one's privacy and 4th and 5th constitutional amendment rights⁶⁹. Despite the potential infringement on constitutional rights, SCOTUS precedent establish that it is quite legal and constitutionally sound for law enforcement officers to possess only

⁶⁶ Department of Homeland Security Press Office, 20 December 2012. "DHS Determines 13 States Meet REAL ID Standards", <http://www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards>

In the final sentence of Section 2(b), a list of acceptable forms of identification is listed. Amongst this list are government issued licenses, such as state issued drivers licenses. The federal government, since the passing of the REAL ID Act of 2005 allows for certain states' drivers licenses as acceptable forms of identification. However, only 13 states by December 2012 had enacted adequate standards for their state's driver's licenses to be acceptable forms of identification at federal run institutions. Arizona was not one of these 13 states, but the standard of accepting IDs is the same. Because of this reiteration of standards at the state level, the federal government can preempt this state law.

⁶⁷ Ibid 42 p4817

⁶⁸ Ibid 42 p4812, Supremacy Clause preempts state laws that interfere with or are contrary to federal law

⁶⁹ Eng, James. NBC News. "Next step for Arizona Immigration law: back to the courts?" 26 June 2012. <http://usnews.nbcnews.com/news/2012/06/26/12420482-next-stop-for-arizona-immigration-law-back-to-the-courts?lite>

Some activist groups and political pundits argued prior to SCOTUS ruling that SB1070 violated 4th and 5th amendment rights of citizens and legal residents. NBC News example: "Among the possible claims are that the provision violates the Fourth Amendment right against unreasonable searches and seizures and that it invites racial profiling, ACLU officials say."

‘reasonable suspicion’, not even ‘probable cause’, in order to stop anyone they see fit and request that person’s name and appropriate identification⁷⁰.

This extensive power and re-defining of the constitutional rights arose from *Terry v. Ohio* [1968]. *Terry* stops, or “stop-and-identify” laws, allow law enforcement officers to stop and question anyone they suspect of “being involved in, about to be involved in, or is in the process of carrying out a crime”⁷¹. Acquiring personal information through a *Terry* stop, according to SCOTUS, is not unconstitutional⁷². In fact, active failure to comply with such police requests is a punishable offence, which upon incarceration the law enforcement officers have the right to acquire your identification and verify it with the federal government⁷³. Law enforcement agencies were given these powers to determine whether their officers may be in any present danger or if the person in question was wanted for committing, or in the process of committing, a crime⁷⁴. Due to *Terry v Ohio* and *Hiibel v 6th Judicial District Court of Nevada*, the provisions within the first sentence of Section 2(b) do not

⁷⁰ Warren, C.J. SCOTUS. Cornell School of Law. “*Terry v. Ohio*, 392 U.S. 1 [1968]”.

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0392_0001_ZO.html

“Where a reasonably prudent officer is warranted in the circumstances of a given case in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual for crime or the absolute certainty that the individual is armed.”

⁷¹ Ibid 70, “The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”

⁷² Ibid 70, “The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the [p29] scope of governmental action as by imposing preconditions upon its initiation. *Compare Katz v. United States*, 389 U.S. 347, 354-356 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that “limitations upon the fruit to be gathered tend to limit the quest itself.” *United States v. Poller*, 43 F.2d 911, 914 (C.A.2d Cir.1930); *see, e.g., Linkletter v. Walker*, 381 U.S. 618, 629-635 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206, 216-221 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden v. Hayden*, 387 U.S. 294, 310 (1967)”

⁷³ Ibid 70

⁷⁴ Ibid 70

violate the 4th and 5th amendments of the Constitution, thus not making SB1070 unconstitutional for this claim⁷⁵.

⁷⁵ *Hiibel v 6th District Court of Nevada* 542 U.S. 177 [2004]. Cornell School of Law.

<http://www.law.cornell.edu/supremecourt/text/03-5554#writing-ZO>

The law enforcement officer asking for identification “did not violate Hiibel’s Fourth Amendment rights. Ordinarily, an investigating officer is free to ask a person for identification without implicating the Amendment. *INS v. Delgado*, 466 U. S. 210. Beginning with *Terry v. Ohio*, 392 U. S. 1, the Court...recognized that an officer’s reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. Although it is well established that an officer may ask a suspect to identify himself during a *Terry* stop... it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer, ... The Court is now of the view that *Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop... The Nevada statute is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures because it properly balances the intrusion on the individual’s interests against the promotion of legitimate government interests. See *Delaware v. Prouse*, 440 U. S. 648. An identity request has an immediate relation to the *Terry* stop’s purpose, rationale, and practical demands, and the threat of criminal sanction helps ensure that the request does not become a legal nullity. On the other hand, the statute does not alter the nature of the stop itself, changing neither its duration nor its location. Hiibel argues unpersuasively that the statute circumvents the probable-cause requirement by allowing an officer to arrest a person for being suspicious, thereby creating an impermissible risk of arbitrary police conduct... They are met by the requirement that a *Terry* stop be justified at its inception and be “reasonably related in scope to the circumstances which justified” the initial stop. *Terry*, 392 U. S., at 20. Under those principles, an officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop. Cf. *Hayes v. Florida*, 470 U. S. 811. The request in this case was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State’s requirement of a response did not contravene the Fourth Amendment.

“Hiibel’s contention that...conviction violates...Fifth Amendment’s prohibition on self-incrimination fails because disclosure of his name and identity presented no reasonable danger of incrimination. The Fifth Amendment prohibits only compelled testimony that is incriminating, see *Brown v. Walker*, 161 U. S. 591, and protects only against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used, *Kastigar v. United States*, 406 U. S. 441. Hiibel’s refusal to disclose was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish evidence needed to prosecute him. *Hoffman v. United States*, 341 U. S. 479. It appears he refused to identify himself only because he thought his name was none of the officer’s business. While the Court recognizes his strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature’s judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him. Answering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances... If a case arises where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense, the court can then consider whether the Fifth Amendment privilege applies, whether it has been violated, and what remedy must follow.”

The Ninth Circuit Court of Appeals’ opinion on *State of Arizona et al. v United States of America [2011]* also recognized that Section 2(b) was not a violation of constitutional rights and that law enforcement officers, who possessed ‘reasonable suspicion,’ could pull anyone aside and ask for his or her identification⁷⁶.

The majority of controversial elements of SB1070 have been preempted as they interfere with Congress’ immigration policy scheme; however, as established in the Ninth Circuit Court of Appeals ruling, Section 2(b) also met one of the two circumstances for federal preemption as it also interferes with Congress’ immigration policy scheme as Arizona plans to direct its officers in how to enforce immigration law contrary to that established in federal immigration law⁷⁷⁷⁸. The Ninth Circuit Court continues by describing how SB1070, though it could abide by the INA 8 U.S.C. 1357(g) exception of state and local law enforcement officers working for the federal government to implement federal immigration law, fails to abide by the provisions of these limited and directed programs as Arizona failed to meet the quintessential requirement of working in tandem with and by sole direction of the Attorney General⁷⁹⁸⁰. This is the case because Arizona interferes with the federal government’s

⁷⁶ Ibid 42 p4816

⁷⁷ Ibid 42 p4812

Federal Preemption Doctrine was established in Supremacy Clause Article 6 Clause 2 of the Constitution, in addition with,

“Fundamental principle of Constitution...that Congress has the power to preempt state law”

Crosby v National Foreign Trade Council, 530 U.S. 363,372 (2000)

⁷⁸ Ibid4 2 p4819-4822

⁷⁹ Ibid 42 p4818-4819

Congress listed conditions in which state and local officials are permitted to assist the executive in enforcing immigration laws in that Congress allows the Attorney General to enter into “written agreement[s] with State[s]”, thus allowing the Attorney General to recruit state and local law enforcement, when qualified, to perform a function of an immigration officer – investigation, apprehension of aliens in US (8 U.S.C. 1357(g)(1)). Subsection 3 of this provision provides such people of the state to be subject to direction and supervision of the Attorney General; Subsection 5 requires written agreement must specify the powers and duties granted to the individual, the duration of said powers and the role and oversight the Attorney General will supervise said individual with.

⁸⁰ Ibid 42 p4823

authority to implement priorities and strategies in law enforcement by imposing mandatory obligations on state and local officers, as stressed in sentences 2 and 3⁸¹. Moreover, because the Attorney General is not directing the state of Arizona to enforce immigration policy at the state level through the 1357(g) program, Arizona's state and local law enforcement officers retain no jurisdiction or ability to enforce their state level immigration law under INA 8 U.S.C. 1357(g)⁸².

Section 2(b) further conflicts with federal law as it poses a risk to Congress' intent and undermines the President's intended statutory authority in relations to implementing and enforcing immigration policy, again fulfilling one of the circumstances for federal preemption of state law as granted by the Supremacy Clause⁸³. Specific SCOTUS precedent establishes the extent to which SB1070 affects federal authority:

- “1) Section 2(b)’s ‘unyielding’ mandatory directives to Arizona’s law enforcement “undermines the President’s intended statutory authority” to establish immigration enforcement priorities and strategies
Crosby, 530 U.S. at 377
- 2) Is an obstacle to accomplishment and execution of full purpose and objectives of Congress in INA provisions for SB1070 subverts Congress’ intent of state discretion and close supervision by the Attorney General.

Arizona argues in INA Provision 8 U.S.C. 1373(c), that “Congress has expressed a clear intent to encourage the assistance from state and local law enforcement officers” as 1373(c) creates obligation for the Department of Homeland Security to “respond to an inquiry by a federal, state or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual...for any purpose authorized by law”. Argument is preempted by fact Congress contemplated state assistance of identifying undocumented immigrants within the boundaries established in INA 1357(g), and not in a manner dictated by a state law that furthers a state immigration policy. In fact, Congress directed appropriate federal agency to respond to state inquiries about immigration status at the time it authorized Attorney General to enter into 1357(g) agreements with states, making Arizona’s argument invalid.

⁸¹ Ibid 80

⁸² Ibid 42 p4824

By imposing its own mandatory obligations on state and local officers, Arizona’s SB1070 interferes with Federal government’s authority to implement priorities and strategies in law enforcement. Thus Section 2(b) interferes with Congress’ delegation of discretion to Executive branch in enforcing INA without the Attorney General’s consent.

⁸³ Ibid 82

Judge Paez states that in *Crosby*, 530 U.S. 363, SCOTUS found that state law is preempted because it poses an obstacle to Congress’ intent and that state law undermines the President’s intended statutory authority by interpreting and enforcing immigration policy at the state level.

Hines, 312 U.S. at 67

3) SB1070 has caused actual foreign policy problems

If a state law produced something more than incidental effect in conflict with foreign policy of national gov't, state law would be required to be preempted

539 U.S. at 420 *Garamendi*”⁸⁴

In fact, SB1070 has caused actual foreign policy problems for the American federal government, problems beyond the scope of incidental standard provided in *Garamendi*⁸⁵. Numerous foreign governments and leaders have publicly criticized the Arizona law:

“The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations.”⁸⁶

As SB1070 caused a substantial international incident, the federal government, as dictated in *Garamendi*, must preempt SB1070 and ensure the law cannot produce any further foreign policy problems⁸⁷.

Section 3 and Section 5(c), unlike Section 2(b), reiterated federal law at the state level, thus are redundant policies and violate the Supremacy clause by making federal crimes state level offenses⁸⁸.

Section 3 provides:

“In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)”⁸⁹.

Section 5(c) provides:

⁸⁴ Ibid 42 p4825,2826

⁸⁵ Ibid 42 p4826

⁸⁶ Ibid 85

⁸⁷ Ibid 42 p4827

Adding to the case of SB1070 causing an international incident, Deputy Secretary of State, James B. Steinberg, attested SB1070 threatens numerous different “serious harms to US foreign relations”

⁸⁸ Ibid 42 p4830-4832

⁸⁹ Ibid 43

“It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public space or perform work as an employee or independent contractor in this state”⁹⁰.

Both of these sections reiterate federal law at the state level, making it a state level offence for unauthorized immigrants to violate federal registration laws⁹¹. The interpretation of this conflict is clear: they are redundant and preempted by federal law. Though Arizona argues Section 3 is not preempted because Congress, “invited states to reinforce federal alien classifications,” nothing in the text of INA’s registration provisions indicates Congress intended for states to actively participate in enforcement or punishment of federal immigration registration rules⁹². Because of this, the federal government, as issued by SCOTUS, retains the ability to federal preemption as these sections attempt to establish authority in a policy area the federal government left no room for states to work in. Furthermore:

“Where federal government, in the exercise of its superior authority... has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations,” *Hines*, 312 U.S. at 66-67⁹³.

This proves, in conjunction with Congress providing very specific directions for state participation in 8 U.S.C. 1357 – which mentions no state participation in the registration scheme – and that the INA contains registration, documentation and possession of proof schemes, that there is sufficient evidence to show Congress knew how to ask for help and that the state of Arizona exceeded its limited

⁹⁰ Ibid 44

⁹¹ Ibid 7

Section 3 is in violation of federal supremacy as it punishes unauthorized immigrants for failing to comply with federal registration laws, which is not a field that states traditionally occupy per *Wyeth*, 129 S.Ct. at 1194

⁹² Ibid 88

⁹³ Ibid 88

jurisdiction⁹⁴. From this analysis of SB1070 and federal immigration policy and law, the federal government should preempt all SB1070's controversial sections.

Despite this, proponents for SB1070 stress that the case brought against the strict immigration policy fail to put forth credible evidence proving the law's illegality. According to Arizona State Senator Russell Pearce, none of the sections of SB1070 should have active injunctions emplaced upon them for the "series of law enforcement provisions enacted...do not determine who should or should not be admitted into the country," and nor do they, "create additional conditions," by which lawfully residing aliens may "remain in the country"⁹⁵. This clause within his amicus brief to the Ninth Circuit Court of Appeals appears to counter the state's intended intent of SB1070, which attempts to make the carrying of identification papers mandatory for all persons within Arizona's borders. Failure to abide by this provision could lead to expulsion or at least examination of one's identity with the federal government; regardless of the outcome, SB1070 seems to establish conditions for those living within the state of Arizona.

Continuing his argument, the state senator believes that instead of fulfilling the standard required to enact injunctions upon SB1070, the district court when, "required to find that under no set of circumstances could [SB1070] be applied constitutionally," failed and used, "several speculative, hypothetical applications of the provisions and found that these applications mandated that it enjoin the provisions from taking effect"⁹⁶. Even though the senator rationalizes the passing of SB1070 as an act by the state government to, "enact a series of law enforcement provisions...[in order to] protect its citizens from serious public safety concerns," the senator's and the state's argument of there not being

⁹⁴ Ibid 88

⁹⁵ Pearce, Senator Russell. Amicus Brief Westlaw. "2010 WL 5162516" p4

⁹⁶ Ibid 95

enough evidence to preempt or enact injunctions against SB1070 fail to abide by established legal precedent, a simple reading of their own law and the Supremacy Clause⁹⁷.

Instead of simply adding to a state's ability to enact legislation to defend its citizenry or violating constitutional rights, SB1070 violated the federal government's supremacy and immigration policy structure by preempting federal jurisdiction; because of this and the sheer number of violations of legal precedent and federal laws aforementioned, SB1070 represents an unconstitutional piece of legislation enacted by a member-state actor circumventing centralized authority. The state law, including Section 2(b), should be removed from statute by federal preemption.

2.3.2 Second Subsection: Why in the year 2010?

Despite claiming SB1070 as a necessity to combat illegal immigration and protect the citizenry of Arizona, proponents for the stringent Arizona law, in addition to its established unconstitutionality, enacted a law that does not support their arguments. In order to establish why Arizona passed SB1070 in 2010, a main cause for the state's aggressive action is required. According to Governor Jan Brewer, SB1070 was desperately needed as illegal immigration continues to become a supposedly ever-worsening problem that the federal government neglects to address⁹⁸.

⁹⁷ Ibid 95

⁹⁸ Brewer, Governor Jan.

p1,2 "Border-related violence and crime due to illegal immigration are critically important issues to the people of our state, to my Administration and to me, as your Governor and as a citizen. Here is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life. We cannot delay while the destruction happening south of our international border creeps its way

Claims requiring action in 2010 to address an increasing problem appear to be disingenuous, as information released by the Department of Homeland Security (DHS) shows that illegal immigration, over the past several years, has diminished due to the economic recession and improved economic situation in Mexico⁹⁹. Based on statistics that classify unauthorized immigrants as, “all foreign-born non-citizens who are not legal residents,” the DHS estimated the level of unauthorized residents in the US, using the 2000 and 2010 census information to compensate the figures, being about 11.6 million persons in 2010, down from the height of the unauthorized person population of 11.8 million in 2007¹⁰⁰¹⁰¹.

Though illegal immigration continued, over the past decade the increase of illegal immigrants entering the US diminished. As depicted by the DHS, the height of the unauthorized immigrant population in the US was 2007. To further supplant the statistics that illegal immigration is no longer as paramount an issue as in the past, the DHS discovered the peak of

north. We in Arizona have been more than patient waiting for Washington to act. But decades of federal inaction and misguided policy have created a dangerous and unacceptable situation.”

⁹⁹ Hoefer, Michael & Rytina, Nancy & Backer, Bryan. *Department of Homeland Security Office of Immigration Statistics*, “Estimates of the Unauthorized Immigrant Population Residing in the US: January 2011” March 2012. http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf p3 “It is unlikely that the unauthorized immigrant population increased [after 2007] given relatively high U.S. unemployment, improved economic conditions in Mexico, record low numbers of apprehensions of unauthorized immigrants at U.S. borders, and greater levels of border enforcement.”

¹⁰⁰ Ibid 99

This is the process by which the DHS conducted this survey and report.

“This report provides estimates of the size of the unauthorized immigrant population residing in the US as of January 2011 by period of entry, region and country of origin, state of residence, age, and sex. The estimates were obtained using the “residual” methodology employed for previous estimates of the unauthorized population (see Hoefer, Rytina, and Baker, 2011). The unauthorized immigrant population is the remainder or “residual” after the legally resident foreign-born population—legal permanent residents (LPRs), naturalized citizens, asylees, refugees, and nonimmigrants—is subtracted from the total foreign-born population. Data to estimate the legally resident population were obtained primarily from the Department of Homeland Security (DHS), whereas the American Community Survey (ACS) of the U.S. Census Bureau was the source for estimates of the total foreign-born population.”

¹⁰¹ Ibid 99 p2,3

illegal immigration into the US being between 1995 and 2004¹⁰². The DHS found that of the 11.5 million unauthorized immigrants in the US by 2011, only 1.58 million entered the US after 2005, in contrast to the higher levels during 1995-1999 and 2000-2004 with 3.03 and 3.33 million respectively, demonstrating illegal immigration is becoming a less severe problem¹⁰³. Though the entire nation's illegal immigrant influx lessened after 2004, did Arizona's increase?

Analogous with the national trend, the state of Arizona's illegal immigration population grew by a steadily smaller number since 2000. In fact, the unauthorized population in Arizona only increased by an additional 30,000 by 2011 since 2000¹⁰⁴. Also, Arizona's estimated population of unauthorized residences in 2011 represents only 3.12% of illegal immigrants in the country, ninth in the listed states in the DHS' recent survey estimates¹⁰⁵.

Thus, if SB1070 was issued to address an ever-increasing problem in the US and Arizona, governmental statistics show despite the overall unauthorized residence population increasing in the US, it does so by a diminishing rate. Furthermore, the average annual change estimated by the DHS for the state of Arizona was calculated to be less than plus 3,000 persons a year, far less than California and Texas, two other states that border Mexico and represent gateways for Central and Southern American immigrants¹⁰⁶. Nationally, the influx of illegal immigration began to subside almost a decade ago, so such a stringent immigration policy, with all constitutional arguments aside, is not as needed as during the 1990's. As its first two attempts to pass similar legislation failed due to former Governor Napolitano's continued vetoes, Arizona,

¹⁰² Ibid 99 p3

¹⁰³ Ibid 99 p3

¹⁰⁴ Ibid 99 p5

¹⁰⁵ Ibid 99 p5

¹⁰⁶ Ibid 99 p5

despite the diminishing influx of illegal immigrants, may have wanted to pass the legislation once a Republican was governor.

Another reason for why Arizona may have enacted SB1070 is because Arizona represents one of 31 state members of the group “State Legislators for Legal Immigration”¹⁰⁷. Described as a “network of state legislators,” these states signed a pledge to work in tandem with federal, state and local government officials in order to, “eliminate all economic attractions and incentives for illegal aliens, as well as securing our borders against unlawful invasion”¹⁰⁸. Such strong and direct language implicates the extreme nature and nationalist tendencies these legislators possess regarding illegal immigration and possible illegal immigrants entering this country.

Whether this group influenced and helped articulate SB1070 and furthered state level immigration policies across the US, or whether SB1070 was an action taken by a Republican-led state legislator so as to rally the electoral base during a mid-term election year, Arizona suffers in capacities not simply limited to political debate and legal battles. The state of Arizona incurs significant economic repercussions because of SB1070. For instance, regarding tourism, Arizona, by signing its immigration policy into law, initiated a, “fierce national backlash against the state,” which led many prominent figures, “national organizations and opinion leaders to call for economic boycotts”¹⁰⁹. Due to major groups and organizations cancelling conventions and

¹⁰⁷ Price, Susan p1,2

State members of the group consists of a mixture of northern and southern states: Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia and West Virginia

¹⁰⁸ Ibid 107 p2

The goal of this group is to reduce or eliminate the possibility of illegal immigrants from receiving any form of “public benefits, welfare, education and employment opportunities.”

¹⁰⁹ Hudson, David. *Center for American Progress* “The Top 5 Reasons Why S.B. 1070—and Laws Like It—Cause Economic Harm: Arizona’s Anti-Immigration Law Has Significant Economic Consequences

associations with the state due to the stringent immigration law, Arizona faced an estimated “\$141 million in conference losses [alone]... in the first year after passing SB1070”¹¹⁰. Additional loss was felt regarding the overall tourism industry in the first year after passing SB1070¹¹¹. Furthermore, the state does not face only immediate economic, but also future and educational consequences¹¹². As many legal Latino and foreign born students attend Arizona schools, they, as expressed by Arizona’s Maricopa Community College Chancellor Rufus Glasper, may face, “the offensive and discriminatory prospect of incessant demands to show their documents...we can expect...some will find this...discouraging and will discontinue their pursuit of education [in Arizona]”¹¹³. Because of this, a number of students are transferring and moving from the state. In addition to the diminishing student population, other persons and families in Arizona are also looking to leave the state, lowering the overall student and workforce population, further hurting the state’s economy¹¹⁴.

SB1070 style laws also are established as economically destructive by a recent CATO report. This report states that SB1070 is, “economically destructive and inimical to growth,” as the law forces illegal, and some legal, residents to flee the state, taking their business, resources

for the Nation” 25 June 2012.

<http://www.americanprogress.org/issues/immigration/news/2012/06/25/11677/the-top-5-reasons-why-s-b-1070-and-laws-like-it-cause-economic-harm/>

¹¹⁰ Ibid 109

¹¹¹ Ibid 109

“The impact on Arizona’s tourism industry in the first year after S.B. 1070 went on the books included the loss of an estimated \$253 million in economic output, \$9.4 million in tax revenues, and 2,761 jobs.”

¹¹² Ibid 109

Because of the controversial nature of the law, many out-of-state students and persons residing within the state are looking elsewhere other than Arizona for tertiary education, so as not to be associated with the law. “Higher-education leaders in Arizona have said that their colleges and universities have already lost students, including out-of-state honors students, who don’t want to be subject to the racial profiling law.”

¹¹³ Ibid 109

¹¹⁴ Ibid 109

“Citizens and lawful residents who are part of mixed-status families (families with some undocumented immigrants and some legal or citizen members) or who simply don’t want to undergo the scrutiny mandated under the new law are also leaving Arizona, further hurting the state’s economy.”

and income elsewhere¹¹⁵. These real world implications and economic losses caused by SB1070 mirror those of a Center for American Progress 2011 study, which estimated that if SB1070 were entered into full force without any judicial injunctions it would register a significant economic consequence to an already struggling state economy¹¹⁶. In short, the, “economic dislocation envisioned by S.B. 1070-type policies,” in addition to the legal costs of defending SB1070 in court, “runs directly counter to the interests of our nation as we continue to struggle to distance ourselves from the ravages of the Great Recession,”¹¹⁷.

Despite evidence showing a decrease in the Hispanic and illegal immigrant population in Arizona, SB1070 does not represent the sole reason for this action¹¹⁸. Furthermore, with SCOTUS’ ruling as well as discovered constitutional concerns worthy of federal preemption regarding all the controversial sections of SB1070, in addition to international and state level

¹¹⁵ Ewing, Walter. Immigration Impact “Arizona’s Immigration Policies are an Economic Disaster” 27 September 2012. <http://immigrationimpact.com/2012/09/27/arizonas-immigration-policies-are-an-economic-disaster/>

“According to the CATO report, ‘Arizona-style laws are economically destructive and inimical to growth.’ That is because ‘the unauthorized immigrants who left the state took their businesses, money, and spending power with them, which reduced demand for the goods and services that unauthorized immigrants purchased in the state.’ Moreover, ‘Arizona’s immigration laws drove thousands of renters and homeowners from the state, putting downward pressure on residential real-estate prices in the midst of a housing price collapse.’”

¹¹⁶ Ibid 115

The study conducted by the Center for American Progress “estimated that if SB 1070 were successful in its objective of removing all unauthorized immigrants from the state, Arizona would lose \$29.5 billion in labor income, \$4.2 billion in tax revenues, and 581,000 jobs. Why? Because “when undocumented workers are taken out of the economy, the jobs they support through their labor, consumption, and tax payments disappear as well””.

¹¹⁷ Ibid 115

¹¹⁸ O’Dowd, Peter. *Fronteras Desk*, AZPM NPR PBS. “SB1070: Political Win, Economic Loss?” 26 June 2012. <https://www.azpm.org/p/top-news/2012/6/26/13726-sb-1070-political-win-economic-loss/>

Though sources cannot agree on a specific number of unauthorized workers who have left the state, it is determined that a significant number have left Arizona, whether to return to other states or their country of origin. SB1070 does not represent the sole reason for this movement of persons, though. “Since 2009, it’s estimated that as many as 200,000 illegal immigrants left Arizona on their own. Economists and others have said it was a combination of the state’s weak job market, the political climate and other factors that spurred that departure.”

economic ramifications and consequences caused by this law, SB1070 must be completely preempted and removed from statute.

3.0 SECOND CHAPTER – CASE STUDY: FRANCE V EUROPEAN UNION

3.1 FIRST SECTION: BACKGROUND OF FRENCH DEPORTATION OF ROMA

The EU, similar to the US federal government, is a centralized political and economic actor with numerous member-states that, through ratified treaties and centralized legislation, established delineations of power and jurisdiction. Dissimilar to the defined roles of government and judicial precedent in the US, the EU lacks structure, political supremacy and specific judicial precedent regarding the issue of immigration policy.

Instead of establishing its central authority within a codified document, such as the US Constitution, the EU bases its current political and economic structure and delineation of powers within a myriad of ratified treaties, directives and agreements¹¹⁹. Despite creating an intricate and strong, centralized monetary union with a single market and currency zone, these treaties linked the member-states of the EU in a weak, loosely defined political authority¹²⁰. European countries continue to disagree over whether to establish a solely intergovernmental or more federal political system. Due to this lack of cohesion or centralization of authority, immigration policy's jurisdiction within the European system is difficult to delineate. Additionally, analyzing

¹¹⁹ Borragán, Nieves Pérez-Solórzano & Cini, Michelle. *European Union Politics*. 3rd ed. Oxford: Oxford University Press, 2010. Print. p33

For example, the Treaty establishing the European Union and the Treaty on the Functioning of the European Union (Maastrich 1993, Amsterdam 1997, Lisbon 2009)

¹²⁰ Ibid 119 p33-46

the EU's supremacy represents a more arduous process than the US's system. Because of a lack of single authority, the European model allows for member-state-level implementation of EU policy, resulting in potentially different interpretations.

The EU, due to its lack of complete political jurisdiction over immigration policy, also faces an immigration controversy. The Sarkozy-led UMP (Conservatives) French government, during the summer of 2010, initiated a program to deport immigrants due to their lack of finding employment after a 3-month minimum residency¹²¹. This action, initially thought uncontroversial and abiding by EU law, quickly exploded as a French government circular indicated the closing of 300 immigrant camps and expulsion of over 1,000 immigrants targeted one specific group: ROMA¹²². The French government's action, "a... breach of the EU ban on ethnic discrimination," resulted in the European Commission's desire to, "launch infringement proceedings, meaning that France could be hauled before the European Court of Justice"¹²³.

Regardless of the EU's unfinished political structure, the Commission, the executive political actor of the EU, "is charged with upholding European law," granting the Commission significant power and influence over member-states' governments and policies¹²⁴. The Commission, in its oversight capacity, discovered France's immigration initiative in the wrong on two major accounts: firstly, it "was breaking a 2004 law enshrining freedom of movement across the EU" as ROMA, from Romania and Bulgaria, are EU citizens; and secondly, that, "the EU's charter of fundamental rights outlaws discrimination on ethnic grounds"¹²⁵.

¹²¹ Ibid 2

¹²² Ibid 3

¹²³ Ibid 3

¹²⁴ Ibid 3

¹²⁵ Ibid 3

Despite the issue's extensive debate, the controversial French policy remains in effect¹²⁶. France, similar to Arizona with SB1070, enacted a governmental policy contrary to the will of, and delineated powers bestowed upon, its larger, centralized political authority, violating agreements and treaties it signed as a member-state of the EU.

The issue of the French Romani Repatriation policy stems from an earlier problem, one present before the governmental circular of 2010. France, similar to a myriad of European nations, actively deported ROMA prior to 2010 without much EU or international resistance; in fact, the French government, in 2009, deported nearly 10,000 ROMA¹²⁷. But who are the ROMA and why is this specific group of persons being actively targeted?

The ROMA, a nomadic people originating from India, currently reside and travel throughout Europe¹²⁸. In fact, ROMA are believed to represent, "the largest minority in Europe," with estimates of their continental population ranging between 7 and 12 million, as there is no precise demographic data available¹²⁹. Moreover, the generic term ROMA is utilized to classify peoples who, "[describe] themselves as Roma, Gypsies, Travellers, Manouches, and Sinti"¹³⁰. Though the classifications Gypsy and ROMA are commonly used and interchangeable terms, both terms originate from mistaken assumptions regarding their origin or limited description capacity; for example, the term, "Gypsy originated from the mistaken assumption that Gypsies

¹²⁶ Ibid 3

¹²⁷ BBC, "Q&A: France Roma expulsions" 19 October 2010. <http://www.bbc.co.uk/news/world-europe-11027288>

"In fact, France has closed down illegal Roma camps and sent their inhabitants home for years. Last year 10,000 Roma were sent back to Romania and Bulgaria, the government says."

¹²⁸ Ibid 127

"The Roma are a nomadic people whose ancestors are thought to have left north-west India at the beginning of the 11th Century and scattered across Europe."

¹²⁹ Uzunova, Iskra. *Arizona Journal of International & Comparative Law*, Vol. 27, No. 1 "Roma integration in Europe: Why minority rights are failing" 2010. http://academos.ro/sites/default/files/biblio-docs/845/roma_integration_in_europe.pdf p288

¹³⁰ Ibid 129 p287

came from Egypt,” and, “the term Roma is similarly misdirecting to the extent it suggests Romanian origins”¹³¹. Despite ROMA being a common descriptor, the term is used to describe persons belonging to both, “nomadic and non-nomadic communities—diverse in respect to language, religion, nationality, history, and culture—but understood to share a common ethnicity”¹³².

The continued persecution or removal of ROMA from European societies represents the social tension towards ROMA integration. Due to their culture and livelihood, the ROMA refuse to assimilate into other cultural identities, such as the French identity. The historic and cultural differences between the ROMA and others in addition to the continued social tension forms the, “mistrust between Roma and non-Roma,” adding to the contemporary episode. This chapter, in its legal analysis and contextual political section, will address this social tension further and better address how and why the ROMA are targeted and why other Europeans do not want them residing in their societies.

France, despite not retaining one of Europe’s largest concentration of ROMA, possesses a current estimate population between 400,000 and 500,000 ROMA, most being members of long-established communities; additionally, according to the, “French Roma rights umbrella group FNASA...about 12,000 ROMA from Romania and Bulgaria,” also currently reside in France¹³³. These persons, unlike the aforementioned 400,000 to 500,000, are believed to live within unauthorized camps outside urban centers, or to have entered France illegally¹³⁴. Though ROMA from Romania and Bulgaria are EU citizens and possess the rights of citizenship entitled to them – via the Treaty on the EU, Charter of Fundamental Rights, and 2004 Directive on the Rights of

¹³¹ Ibid 130

¹³² Ibid 130

¹³³ Ibid 130

¹³⁴ Ibid 127

Movement for EU citizens – citizens from both Romania and Bulgaria must acquire residency permits to reside within France after a three month period without finding employment¹³⁵. This is the case because though Romania and Bulgaria are currently member-states of the EU, neither are integrated members within the Schengen Area. Because of this, special provisions can be enforced upon these states for a limited duration, as the aforementioned added immigration standards, minimizing the potential influx of Romanians and Bulgarians into France. As many ROMA fail to acquire such residency permits or employment after three months, the French government, with the suspicion of many ROMA residing in the country illegally, took action to deport ROMA.

In order to better analyze this deportation policy, this chapter will classify immigration policy's jurisdiction within Europe by examining treaties and legal precedent that established the EU. Section 2 of this chapter will analyze treaties regarding human rights, the free movement of EU citizens, and the founding and functioning of the EU, as well as EU legal precedent. The goal of this section is to determine whether the EU retains legal authority and supremacy over member-states regarding immigration policy, similar to the US case study, or if the EU even possesses the capability to install and enforce centralized immigration policy. Additionally, Section 2 will establish the rights of citizens of the EU regarding immigration and movement within the EU member-states' territories. Section 3 will focus on the 2010 French government circular and the significance of the French government's action towards ROMA and determine

¹³⁵ Ibid 127

As Romania and Bulgaria entered the EU during 2007, their citizens retain, "the right to enter France without a visa, but under special rules they must have work or residency permits if they wish to stay longer than three months. These are hard to come by, and most Roma from the two countries are thought to be in France illegally. Nine other EU states also have restrictions in place, typically requiring work permits. From January 2014, or seven years after the two countries' accession, Romanians and Bulgarians will enjoy full freedom of movement anywhere in the EU."

the legality of the governmental initiative. Furthermore, Section 3 will examine why France took action against the ROMA, targeting them as a group despite their protected ethnic minority status.

3.2 SECOND SECTION: EUROPEAN UNION STRUCTURE AND PRECEDENT – WHO HAS JURISDICTION OVER IMMIGRATION?

Similar to the US Constitution, the legal founding documents and treaties of the EU do not express with clear and active intent which level or component, if any, of European-level government retains jurisdiction over immigration policy. In order to establish the rights and jurisdiction of EU citizens and immigration policy, the founding documents of the European Union and Community, as well as the treaties establishing the rights of EU citizens, must be examined.

Many European nations, after ratifying the founding charter of the UN, also signed the Convention for the Protection of Human Rights and Fundamental Freedoms – what later developed into the Charter on Fundamental Freedoms, the EU’s equivalent of the US’ Bill of Rights¹³⁶. This ratified treaty, which France signed, declares and outlines the rights of its member-states’ citizens. As granted by the Convention’s Article 5, every person is granted the right to liberty and security of one’s self except in certain circumstances such as regarding

¹³⁶ Convention For the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950 p5 ‘Governments’ members of Council of Europe, following the UN’s Universal Declaration of Human Rights, on the 10th of December 1948, aim to secure recognition and observance of human rights by maintaining and furthering realization of human rights and fundamental freedoms in order to establish a greater unity between members. The reaffirmation of fundamental freedoms will represent the foundation of justice and peace globally and will be best maintained by effective political democracy and by a common understanding and observance of humans rights for which they depend.’

unauthorized entry into a signing member-state's territory¹³⁷. The Convention also states, in Article 14, that the, "enjoyment of rights and freedoms set forth in this Convention will be secured without discrimination on any grounds," preventing specific groups of persons being targeted by national governments, as conducted by the former Nationalist Socialist Party of Germany¹³⁸. Similarly, Article 17 of the Convention protects the rights and freedoms of citizens of the High Contracting Parties (HCP), the countries, signing members, of the Convention, from being altered or diminished¹³⁹. These rights aforementioned are further protected by Protocol 12 to the Convention, ensuring the, "enjoyment of any right set forth by law shall be secured without discrimination on any ground," to a list more substantial than the original Convention's Article 5¹⁴⁰.

Prior to the signing of the Treaty of the EU or the Schengen *acquis*, the Convention for the Protection of Human Rights and Fundamental Freedoms established a basic form of freedom

¹³⁷ Ibid 136 p8

Article 5 (F): "Lawful arrest and detention of person to prevent... unauthorized entry into country or of person against whom action is taken with view to deport or extradite"

¹³⁸ Ibid 136 p13

Article 14: Prohibition of Discrimination states that no person or group of persons can be discriminated against on grounds of the following provisions: "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Though this list develops over the course of the European Community's political evolution, this initial list makes it illegal to discriminate against minorities or specific groups of persons because of their identity.

¹³⁹ Ibid 136 p14

Article 17: Prohibition of Abuse of Rights, states that "nothing in the Convention implies any State, group or person any right to engage in activity or to perform acts aimed at the destruction of any rights or freedoms set forth". This article establishes that no state actor or group of persons within a state can, with legal authority of this Convention, actively harass or hinder the rights of others.

¹⁴⁰ Ibid 136 p 52

"Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms with regards to Equal Protection of the Law

Article 1: General Prohibition of Discrimination

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as: sex, colour, language, religion, political or other opinion, national or social origin, association with national minority, property and birth or other status. None shall be discriminated against by any public authority on any ground as those [previously listed]."

of movement for the HCPs' citizens. Article 2 of the fourth protocol to the Convention allowed all lawful citizens of HCPs to travel within the territory of each state¹⁴¹; additionally, Article 4 of the fourth protocol further protected this right by making it illegal to collectively expulse aliens¹⁴². Though Article 2 protects a lawful citizen's right to freedom of movement and residency within the territory of an HCP, it does so with specific limitation. This article expresses the limits of citizens' rights, in that they can be restricted, "in accordance with the law and necessary in democratic society in interests of national security or public safety, for maintenance of *ordre public*"¹⁴³. This ability for states to determine when the rights of its citizens are in conflict with its security or laws is demonstrative of the greater issue involving immigration policy's jurisdiction within the modern EU. In addition, these two articles appear to lay the foundation for the treaty of the EU and the rights of the EU's member-states within the Schengen *acquis*.

Before examining the treaty that established the EU, the treaty of Maastricht, the agreement allowing the freedom of movement of citizens within the greater aligned European Community – the Schengen Agreement (*acquis*) – must be investigated. The Schengen *acquis*, signed initially in 1985, abolished checks at common borders on, "movement of persons and [to help] facilitate the transport and movement of goods at borders"; in fact, this treaty established

¹⁴¹ Ibid 136 p38

In Protocol Number 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 (Freedom of Movement) states:

"1) Everyone lawfully within territory of state shall, within territory, have right to liberty of movement and freedom to choose residence

2) Everyone Shall be free to leave any country

3) No restrictions shall be placed on the exercise of these rights other than in accordance with the law and necessary in democratic society in interests of national security or public safety, for maintenance of *ordre public*".

¹⁴² Ibid 136

¹⁴³ Ibid 140

the European Community – the political entity prior to the EU – with an internal market that comprised of no internal frontiers, allowing the free movement of persons and goods within the signatories’ territories¹⁴⁴. Additionally, the agreement establishes legal definitions for specific movements of persons as well as outlines the manner aliens can travel within the territory of the Contracting Parties. The *acquis* also describes how to apply for residence visas within the host Contracting Parties¹⁴⁵.

Importantly, the Schengen *acquis* outlines the process by which long-stay visas, for stays exceeding three months, are assigned. In Section 2, Article 18, long-stay visas are, “national visas issued by the Contracting Party according to...national law,” implying a potential variance of standards and requirements to acquire and maintain a long-stay visa dependent on the member-state¹⁴⁶. Though this article outlines the requirements of the movement of aliens within the Contracting Parties’ territories, these standards do not carry significant importance as the targeted people for the purposes of this paper, the ROMA, are citizens of EU member-states¹⁴⁷. Despite this agreement representing the first draft of a Free Movement Treaty between member-states of the European Communities, Article 61 outlines the manner by which the French

¹⁴⁴ The Schengen Agreement, 14 June 1985. P1

The Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands signed this agreement; furthermore, these signatory states were known as the “Contracting Parties”. The Single European Act, giving it legal authority within the European Community, supplemented this agreement.

“Article 1 Definitions: Internal Borders – common land borders of Contracting Parties, airports and internal flights, sea ports for regular ferry connections exclusively from or to other ports within territories. External Borders: Contracting Parties’ land and sea borders, airports and sea ports

Alien: Any person other than a national of a Member State of European communities.”

¹⁴⁵ Ibid 144

¹⁴⁶ Ibid 144 p6

¹⁴⁷ Ibid 144 p6

“Chapter 4 Article 19: Aliens who hold uniform visas and who are legally entered into the territory of a Contracting Party may move freely within the territories of Contracting Parties during valid visa period. Article 22: Aliens who legally entered the territory of a Contracting Party [are] obliged to report to competent Contracting Party authorities upon entry or within three working days of entry.”

Republic undertakes extradition of persons¹⁴⁸. Also, as Romania and Bulgaria remain outside the Schengen area, their citizens, in France, remain subjects to additional restrictions on the freedom of movement and residency.

The rights and freedoms of EU member-state citizens were later updated by a 2004 Directive of the European Parliament and Council to better represent the EU's understanding of the "right of citizens of the Union and their family members to move and reside freely within the territory of the member-states"¹⁴⁹. By modernizing the rights and abilities of EU member-state citizens to travel and reside within the territory of other member-states, this directive outlines the limited capacity of residency within a host member-state without being subject to specific conditions¹⁵⁰. Even though EU citizenship bestows all citizens with the right to, "move and reside freely within territory of member-states," this freedom is limited to, "residence in host member-state for [a] period not exceeding three months;" beyond this duration, EU citizens would become, "subject to conditions or [additional] formalities," in order to maintain their residence in the host member-state¹⁵¹.

¹⁴⁸ Ibid 144 p 21

Article 61: "The French Republic undertakes extradition for persons, after proceeding brought for acts punishable under French law by penalty depriving person(s) of liberty or detention order of a maximum two year period and under law of requesting Contracting Party by penalty of depriving liberty or detention order of maximum one year".

¹⁴⁹ Directive 2004/38/EC of the European Parliament and the Council – 29 April 2004. p77

¹⁵⁰ Ibid 149 p 78,79

"1) Citizenship of Union confers on all citizens of Union a primary and individual right to move and reside freely within territory of member-states, subject to limitations and conditions laid down in Treaty (of the EU) and to measures adopted to give it effect.

2) Free movement of persons constitutes one of fundamental freedoms of internal market – [an] area without internal frontiers

3) Union citizenship should be fundamental status of nationals of member-states: when they exercise their right of free movement and residence

5) Right of all Union citizens to move and reside freely within territory of member-states should, if exercised under objective conditions of freedom and dignity, also be granted to family members, irrespective of nationality."

¹⁵¹ Ibid 149 p80

The paramount condition EU citizens abide by in order to maintain residence exceeding a three-month period within a host member-state is to not become an unreasonable burden upon the state¹⁵². As established by the leading political authorities of the EU, the right of residence for EU citizens for periods longer than three months, “should be subject to conditions”¹⁵³. Such conditions entail registering with specific authorities in the new place of residence, residence cards, being employed or seeking employment within the host member-state and the need to not become unreasonable burdens upon the social system of the host member-state¹⁵⁴. If persons fail to abide by these conditions, they could be expelled¹⁵⁵.

“9) Union citizens should have the right of residence in host member-state for period not exceeding three months without being subject to conditions or formalities other than requirement to hold a valid identification card or passport, without prejudice to more favourable treatment applicable to job-seekers as recognized by case-law of the European Court of Justice”.

¹⁵² Ibid 149 p81

“10) Persons exercising right of residence should not become an unreasonable burden on social assistance system of host member-state during initial period of residence. The right of residence for Union citizens and family members for periods in excess of three months should be subject to conditions.”

¹⁵³ Ibid 152

¹⁵⁴ Ibid 149 p93,94

“Article 7: Right of residence for more than 3 months

1) All Union citizens have right of residence on territory of another member-state for a period longer than three months if: a) are workers or self-employed persons in host member-state, b) have sufficient resources for themselves and family members not to become a burden on the social assistance system of host member-state and have comprehensive sickness insurance cover in host member-state, c) are enrolled at a private or public establishment for principal purpose of following a course of study, d) family members accompanying or joining a Union citizen who satisfies conditions referred to in points (a), (b) or (c).

3) Union citizen who no longer is a worker or self-employed person can retain the status of worker or self-employed person in the following conditions: a) Is temporarily unable to work as a result of illness or accident, b) is in duly recorded involuntary employment after been employed for more than a year and registered as a job-seeker with relevant employment office, c) is in duly recorded involuntary unemployment after completing a fixed-term employment contract less than a year after having become involuntary unemployed during first twelve months and registered with a relevant employment office – status of worker shall be retained for no less than six months.

¹⁵⁵ Ibid 149 p 81,82

“12) For periods of residence longer than three months, member-states should have the possibility to require Union citizens to register with competent authorities in place of residence – attested by registration certificate.

16) As long as beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host member-state, they should not be expelled. An expulsion measure should

Though EU citizens could be deported from a host member-state's territory, "on grounds of public policy, public security and public health," the 2004 Directive expands upon the Convention for the Protection of Human Rights and Fundamental Freedoms's list of protected groups from discrimination¹⁵⁶. As the, "Directive respects fundamental rights and freedoms and observes the Charter," the Directive includes groups such as "membership of ethnic minority," as opposed to simply registered national minority, as a protected class against which a member-state cannot explicitly target or discriminatorily expel¹⁵⁷. It is interesting to note that as the collective European community expanded and developed into the EU, the registered groups of protected persons, against which discrimination is prohibited, also expanded.

In addition to the expanded list of protected persons, the 2004 Directive also ensures that EU citizens cannot be expelled from a host-member state as long as they meet specific requirements¹⁵⁸. As long as said citizens and their families can prove they are employed or actively seeking employment, they cannot be expelled from a host member-state. This provision, in conjunction with the expanded list of protected persons, applies to the Romanian and

not be an automatic consequence of recourse to social assistance system. In no case should expulsion measures be adopted against workers, self-employed persons or job-seekers defined by the European Court of Justice on grounds of public policy or security."

¹⁵⁶ Ibid 149 p87

¹⁵⁷ Ibid 149 p86

31) The Directive respects the rights and privileges bestowed upon member-state citizens within the Charter for Protecting Human Rights and Fundamental Freedoms whilst expanding the protected groups against which discrimination cannot be implemented.

"In accordance with prohibition of discrimination contained in the Charter, member-states' must implement the Directive without discrimination between beneficiaries of the Directive on grounds of: sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of ethnic minority, property, birth, disability, age or sexual orientation."

¹⁵⁸ Ibid 149 p104

The specific requirements above state that the, "expulsion may in no case be adopted against Union citizens and family if: a) Union citizens are workers or self-employed persons, b) Union citizens entered territory of host member-state to seek employment – Union citizens and family may not be expelled as long as EU citizen can provide evidence they are continuing to seek employment and that they have a genuine chance of being engaged."

Bulgarian ROMA as they are citizens of EU member-states and are classified as a group protected from discrimination. Thus, according to the 2004 Directive and the Convention for the Protection of Human Rights and Fundamental Freedoms, the ROMA cannot be discriminated against as a group and cannot be expelled as long as they, after residing in a host member-state for longer than three months, provide evidence of employment or seeking employment.

With the freedoms and privileges of EU citizens recognized, the founding treaties establishing the EU and the functioning of the EU must be examined to determine the jurisdiction of immigration policy in Europe and whether these aforementioned rights are protected and ensured by the central authority of the EU over member-state sovereignty. Though this paper will examine the current treaty establishing the EU and the functioning of the EU, the revised 2009 Lisbon Treaty, this paper will first analyze the original treaty establishing the EU, the Maastricht Treaty of 1992, and its amending treaty, the Treaty of Amsterdam of 1997, in order to understand the evolving nature of the EU's political entity, structure and powers.

The Maastricht Treaty, titled, "Provisions amending the treaty establishing the European Economic Community (EEC) with a view to establishing the European Community (EC)," is recognized as the first founding document of the EU¹⁵⁹. This treaty established an internal market with complete freedom of movement for goods, persons, services and capital, and established the, "approximation of laws of member-states to the extent required for the functioning of the common market"¹⁶⁰. Though this demonstrates the greater significance of the economic aspect of the EC, this nevertheless initiates a unification of political policies across all

¹⁵⁹ The Maastricht Treaty: Provisions amending the treaty establishing the European Economic Community with a view to establishing the European Community, Maastricht 7 February 1992

¹⁶⁰ Ibid 159 p2,3

"Article 3: c) internal market with abolition, between member-states, of obstacles to free movement of goods, persons, services and capital, h) approximation of laws of member-states to extent required for functioning of the common market"

member-states, ensuring some protection and enforcement of EU policies and standards. In fact, at the establishment of the EC, or EU, the emphasis of political authority was granted to the member-states as the, “Community shall act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein”¹⁶¹. Contradictory to the centralized federal government in the US, Europe’s inclusion of limited power, authority and significance in political power indicates the intergovernmental nature of the EC and the member-states’ desire to retain political sovereignty in many policy areas¹⁶². By stressing the EC’s limited capacity and its ability to act, referred to as its, “principle of subsidiarity” to the authority of the member-states, the EC was originally intended to be a weak central authority, lacking the enforceability of the American executive’s bureaucracy.

Building upon a strong economically based treaty, the Treaty of Amsterdam amends Maastricht and introduces more political amendments to the EU’s structure¹⁶³. In 1997, this treaty codified the principles upon which the EU is founded, “The Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”¹⁶⁴. As stated to be common elements held by all member-states, these principles establish the EU’s desire to, “respect the national identities of its member-states,” and ensure the

¹⁶¹ Ibid 159 p3

¹⁶² Ibid 159 p3,4

Further outlining the restrictions of the political powers and jurisdiction of the EC, the Treaty states in Article 3b that, “In areas which do not fall within the Treaty’s exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of proposed action cannot be sufficiently achieved by a member-state and can therefore be better achieved by the community.”

¹⁶³ Treaty of Amsterdam: Amending the Treaty on the European Union, the treaties establishing the European Community and certain related acts. 1997

¹⁶⁴ Ibid 163 p8

“Article F, paragraph 1: The Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to member-states.”

maintenance and development of the Union in regards to the freedom, security and justice of its collective citizenry, including ethnic minorities such as the ROMA¹⁶⁵.

Again, adding upon the weak political powers of the Treaty of Maastricht, Amsterdam expands the authority and oversight powers of the political entities of the EU over its member-states. Opposed to simply working in a subsidiary role, the EU's Commission (the equivalent of the American federal executive branch), Parliament and Council of Ministers (the equivalent of the American federal legislative branch) acquired greater powers to enforce EU policies, treaties and legislation with an ability to suspend certain rights of, or enact punitive measures upon, its member-states¹⁶⁶. In fact, this treaty grants the EU's political entities the ability to take action against any member-state in order to combat, "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"¹⁶⁷. Thus, despite the continued subsidiary nature of the EU in regards to member-states' sovereignty and the limited jurisdiction of the Council, this treaty grants the EU the ability to, within limited, structured powers, combat any form of discrimination meeting the aforementioned criteria. This ability allows the EU to better protect its founding principles and prevent discrimination.

¹⁶⁵ Ibid 163 p8

"5. Article B: To maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with the appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

¹⁶⁶ Ibid 163 p9

For example, the Council is granted the ability to suspend certain rights and privileges of specific member-states that are determined to violate specific EU principles:

"Article F.1: The Council by unanimity on proposal by one third of the member-states or the Commission may determine the existence of serious and persistent breach(es) by a member-state... The Council, with a qualified majority, can suspend certain rights deriving from the Treaty to [the specific] member-state. [Despite any action of this kind taken upon a specific member-state] the member-state's obligations under this treaty will continue to be binding."

¹⁶⁷ Ibid 163 p26

"Article 6a: Without prejudice to the rest of the Treaty and within the limits of powers conferred by the Treaty upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

The Amsterdam Treaty continued to add to the EU's political entity by officially incorporating the Schengen *acquis* into the foundation of the EU. In an annexed protocol to the Treaty on the EU, the, "Protocol integrating the Schengen *acquis* into the EU's framework," established the standards, rights and privileges of the original agreement being integrated as a component of the EU¹⁶⁸. Moreover, the *acquis* is made a fundamental element of the admissions process of new member-states into the EU, expanding upon the "gradual abolition of checks at common borders," in order to "enhance European integration and enable the EU to develop more rapidly into an area of freedom, security and justice"¹⁶⁹¹⁷⁰. However, as aforementioned, Romania and Bulgaria, despite their entrance into the EU, remain outside the Schengen area.

Finally, the Treaty of Lisbon, the current treaty establishing the EU and the functioning of the EU, further centralizes and delineates power to the EU¹⁷¹. Expanding upon the previous two treaties, Lisbon furthers the EU's initiative by declaring that the:

"EU shall uphold and promote its values and interests, contribute to peace... mutual respect among peoples, the protection of human rights... strict observance and development of international law, including...principles of... UN Charter"¹⁷².

Declaring such determination to promote international law and human rights within and external of its borders, the EU's commitment to treat all persons of different backgrounds equally demonstrates its evolution and continued its importance of non-discrimination. Though this

¹⁶⁸ Ibid 163 p93

"Protocol integrating the Schengen *acquis* into the EU's framework: Pertains to all High Contracting Parties... agreements on gradual abolition of checks at common borders on 14 June 1985 and 19 June 1990... with the aim at enhancing European integration and enable the European Union to develop more rapidly into an area of freedom, security and justice."

¹⁶⁹ Ibid 163 p96

"Article 8: For admission of new member-states into the EU, the Schengen *acquis* and further measures taken by the institutions within its scope shall and must be accepted in full by all States candidates for admission."

¹⁷⁰ Ibid 168

¹⁷¹ Treaty of Lisbon: Amending the Treaty on European Union and the Treaty establishing the European Community 2009

¹⁷² Ibid 171 p11

treaty recognizes the, “EU and member-states shall assist each other in carrying out tasks that flow from the treaties,” the EU remains in a subsidiary position in that, “competences not conferred upon the Union in the Treaties remain with the member-states”¹⁷³. Because of this continued subsidiary role in areas not expressively delineated to the EU, the jurisdiction of issues, such as immigration policy, remain vague.

Regardless of the EU’s subsidiary role in policy areas that are not expressed as exclusive competences, the Lisbon Treaty establishes the, “rights, freedoms and principles in the Charter of Fundamental Rights of the EU (7 December 2000, 12 December 2007),” as possessing the same legal value as the Treaties¹⁷⁴. This inclusion, in addition to acceding the Convention for the Protection of Human Rights and Fundamental Freedoms and stressing that the, “EU shall observe [in all activities] the principle of equality of citizens, who shall receive equal attention from [all components of the EU]”, again stresses the EU’s desire to maintain and defend human rights and protect all its citizens¹⁷⁵¹⁷⁶.

The Treaty of Lisbon further delineates the powers granted to the political institutions of the EU. The Commission retains the ability to, “ensure application of Treaties and measures adopted by the institutions pursuant to them,” as well as, “oversee the application of Union law

¹⁷³ Ibid 171 p12

Article 3a and Article 3b

¹⁷⁴ Ibid 171 p13

“Article 6: 1) The Union recognizes the rights, freedoms and principles in the Charter of Fundamental Rights of the EU (7 December 2000, 12 December 2007).”

¹⁷⁵ Ibid 171 p13

“Article 6: 2) The European Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

¹⁷⁶ Ibid 171 p14

This article stresses that every national of a member-state is recognized as a full citizen of the EU, inheriting all the protections and equal representation such citizenship entails. “Article 8: In all activities, the European Union shall observe the principle of equality of citizens, who shall receive equal attention from institutions, bodies, offices and agencies.”

under the control of the Court of Justice of the European Union”¹⁷⁷. These powers, similar to those of the executive branch of the US federal government, grant the Commission the ability to enforce and regulate the treaties and all legislation or agreements that the treaties founding the EU recognize as carrying legal authority, such as the Charter of Fundamental Rights of the EU, Schengen *acquis* and 2004 Directive.

In addition to expressing the enumerated powers to the Commission, the Lisbon Treaty lists the categories and areas of the EU’s competence, establishing its exclusive and shared authority. As aforementioned, the EU, dissimilar to the US federal government, does not possess complete supremacy over its conglomeration of member-states. A result of incomplete centralized supremacy is that the EU can “legislate or adopt legally binding acts,” whenever the, “Treaties confer on the [EU] exclusive competence in specific areas”¹⁷⁸. The limited areas of exclusive competence granted to the EU are: “Customs union; establishing competition rules of the internal market; monetary policy for the Eurozone; conservation of marine biological resources; Common Commercial Policy”¹⁷⁹. None of these areas appear to relate to the jurisdiction of immigration policy.

Concurrently, the list of shared competences between the EU and member-states’ governments is more extensive and contains policy areas that intersect immigration policy’s jurisdiction: “Internal Market; Social Policy; Economic, social and territorial cohesion... Area of freedom, security and justice”¹⁸⁰. Despite requiring the EU to work in coordination with

¹⁷⁷ Ibid 171 p19

Article 9D – The Commission

¹⁷⁸ Ibid 171 p46

Article 2A

¹⁷⁹ Ibid 171 p47

Article 2B

¹⁸⁰ Ibid 171 p47

member-states regarding these areas of shared competence, the EU is allowed to, “take initiatives to ensure the coordination of member-states’ social policies,” such as their treatment of ethnic minorities and immigration policies¹⁸¹. Furthermore, the EU, regardless of an issue’s level of competence, aims to, “combat discrimination [in any member-state] based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”¹⁸². Because of this, the EU, with all its powers and influence, shall, “endeavour to ensure high level of security through measures to prevent and combat crime, racism and xenophobia” throughout its member-states¹⁸³.

With such interest in protecting the rights of all persons and eliminating discrimination and xenophobia, the Treaty of Lisbon grants the European Parliament and the Council the power to adopt measures to establish a common immigration policy¹⁸⁴. This policy, though, creates a set of guidelines for all member-states to use as a template to develop their individual national

Article 2C: “1) The Union shall share competence with the member-states where the Treaties confer. 2) Shared competences between the [EU] and the member-states: a) Internal Market, b) Social Policy, c) Economic, social and territorial cohesion, d) Agriculture and Fisheries, e) Environment, f) Consumer Protection, g) Transport, h) Trans-European Networks, i) Energy, j) Area of freedom, security and justice, k) Common safety concerns in public health matters.”

¹⁸¹ Ibid 171 p48

Article 2D

¹⁸² Ibid 171 p49

Article 5B

¹⁸³ Ibid 171 p58

Article 61

¹⁸⁴ Ibid 171 p61,62

“Article 63a

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in member-states, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: a) the conditions of entry and residence, and standards on the issue by member-states of long-term visas and residence permits, including those for the purpose of family reunification;

b) the definition of the rights of third-country nationals residing legally in a member-state, including the conditions governing freedom of movement and of residence in other member-states;

c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorization.”

policies. Because of the aforementioned ability of the EU to intervene on issues of member-state social policy and prevent discrimination and xenophobia, member-states must not violate or contradict the common policy legislated by the EU. If member-states did so, the Commission could bring legal action against the member-state to the Court of Justice of the EU.

The Lisbon Treaty also outlines the process by which the EU can bring legal action against member-states that fail to enact or abide by EU legislation and treaties. Member-states must adopt measures within their national law to implement legally binding EU laws and acts¹⁸⁵. In cases of member-states not fulfilling their obligation to abide by EU law and the Treaties, the Commission can bring its grievances against a member-state before the Court of Justice of the EU¹⁸⁶. Additionally, if the Commission believes a member-state violates a directive adopted under proper legislative procedure, it may enact a mandatory monetary fine upon the member-state¹⁸⁷. Furthermore, if the Court of Justice discovers the member-state to have created an “infringement” or violation of EU law, it too can impose an additional monetary penalty, not

¹⁸⁵ Ibid 171 p114

“Article 249C: 1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 11 and 13 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.”

¹⁸⁶ Ibid 171 p108

“If the Commission considers that the Member State concerned has not taken the necessary measures to comply with judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

¹⁸⁷ Ibid 171 p108

“When the Commission brings a case before the Court pursuant to Article 226 on the grounds that the Member State concerned has failed to fulfill its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.”

exceeding the cost of the Commission's, upon the member-state¹⁸⁸. This ability of the Court of Justice to deliberate on the legality of EU legislation and law is granted by Article 7 of the Treaty on the EU¹⁸⁹. Unlike the American federal model, the EU's centralized legal and executive systems lack the extensive powers, resources and manpower of the American bureaucracy and judicial system. Without complete supreme authority, constitutional expressed delineation of powers to the judiciary, or the executive manpower to successfully enforce EU legislation and its treaties, the EU currently cannot hold member-states accountable via judicial measures beyond economic sanctions.

Despite lacking a strong executive bureaucracy to enforce EU legislation and hold member-states accountable for their violations of EU standards and treaties, the Treaty of Lisbon does grant the EU a specific power similar to a US Constitutional power granted to the federal government: a supremacy clause. One of the final provisions written into the Treaty of Lisbon deals with the "Declaration concerning primacy", in which it was established that:

"In Accordance with settled case law of COJEU, the Treaties and the law adopted by the Union on basis of Treaties have primacy over the law of member-states, under conditions laid down by case law on the primacy of EC law set out in 11197/07 (JUR 260). Quote from: Opinion of the Council Legal Service of 22 June 2007"¹⁹⁰.

This clause, in regards to the implementation of statutes and treaties, ensures EU supremacy over member-state law. Though not officially written into the treaties, the EU's supremacy is

¹⁸⁸ Ibid 171 p108

"If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment."

¹⁸⁹ Ibid 171 p110

"The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union."

¹⁹⁰ Ibid 171 p256

protected by European legal precedent, as decided by the Court of Justice, which ensures the EU's ability to implement and regulate the Treaties and EU law.

Three Court of Justice cases established the EU's supremacy "clause": *Costa v Enel Case 6/64*; *Administraciones de las Finanzas del Estado v Simmenthal S.P.A. Case 106/77*; and *Marleasing SA v La Comercial Internacional de Alimentación SA Case C 106/89*. These rulings interpreted articles of the EEC and EC founding treaties in regards to the European treaties conflicting with member-state laws. Though not founding as strong a political power as the US' Plenary Power Doctrine, these three cases, starting with *Costa v Enel*, provide the basis for EU supremacy over member-state law, granting the EU's political and judicial branches a significant authority.

During the 1960's, in the European Economic Community, the case of *Costa v Enel* ensured the legitimacy and supremacy of European level treaties and law over the sovereignty of the member-states. In 1964, the Court of Justice ruled that national courts must refer any cases pertinent to the interpretation of the Treaties to the Court of Justice¹⁹¹. The Court of Justice possesses supremacy and jurisdiction over matters of interpreting European level issues and matters of "interpretation of the Treaty," because the, "EEC Treaty [as have subsequent EC and EU Treaties] created its own legal system which became an integral part of the legal systems of its member-states and which their courts are bound to apply"¹⁹². Instead of retaining complete control over all legal and political issues, the member-states, "by creating a community of unlimited duration, [with] its own institutions, personality, own legal capacity and capacity of

¹⁹¹ *Costa v Enel* 6/64 p592

"By means of Article 177, national courts must refer matters to the Court of Justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them."

¹⁹² *Ibid* 191 p593

representation on the international plane,” curtailed their jurisdiction over legal matters as the European political entity has, “real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community [as] the member-states have limited their sovereign rights”¹⁹³. By creating a community with certain supreme powers over the limited-sovereign states, the member-states of the European Community, “created a body of law which binds,” them all together under a single, centralized code of regulation¹⁹⁴. Because of this, a uniform code of Community law is enforced and must be upheld by all member-states as, “executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty,” due to Article 5 of the Treaty and the active prevention of discrimination¹⁹⁵. Furthermore, Community law’s precedence is confirmed by the Treaty’s Article 189, for Community provisions, “would be meaningless if a state could unilaterally nullify its effects by means of a legislative [or judicial] measure which could prevail over Community law”¹⁹⁶. Thus, it is from the need to fulfill the requirements of enforcing a common standard of implementing European legislation and law, as well as to ensure the suppression of discrimination, that a transference of authority and legitimacy from the member-states to the EEC, or today, the EU occurred¹⁹⁷.

Since the *Costa* ruling, the Court of Justice continued its definition of the “direct applicability” concept of Community law with its judgment regarding *Amministrazione delle Finanze dello Stato v Simmenthal S.P.A.* and *Marleasing SA v La Comercial Internacional de*

¹⁹³ Ibid 191 p593

¹⁹⁴ Ibid 191 p593

¹⁹⁵ Ibid 191 p594

¹⁹⁶ Ibid 191 p594

¹⁹⁷ Ibid 191 p595

“Transfer by states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”

*Alimentación SA*¹⁹⁸. Within these rulings, the Court of Justice defined Community law as, “a new legal order of international law,” the subjects of this law being the member-states and their nationals; additionally, Community law’s, “legal system...forms part of the legal system of member-states,” meaning all member-states must recognize and adhere to the authority of the Court of Justice as, “Community law is mandatory and absolute”¹⁹⁹. In fact, national authorities and governments are forbidden from introducing legislation or national provisions that conflict with the Treaty or Community law²⁰⁰. Furthermore, national governments must, “take all appropriate steps to ensure Community law is given full force and effect,” preempting national laws and provisions as Community law, “must be accorded absolute precedence over domestic law”²⁰¹. Thus, similar to the precedent establishing the US federal executive and legislative branches with supreme jurisdiction over immigration policy, these precedents establish Community law and the European Treaties as taking precedence over member-state law and sovereignty²⁰²²⁰³.

¹⁹⁸ *Amministrazione delle Finanze dello Stato v Simmenthal S.P.A.* Case 106/77 p633

¹⁹⁹ Ibid 198

²⁰⁰ Ibid 198

²⁰¹ Ibid 198 634

²⁰² Ibid 198 p643

This is the case because Community law preempts national law of all member-states. “In accordance with the principle of precedence of Community law, the relationship between provisions of the Treaty and the directly applicable measures of the institutions and the national law of the member-states is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but also preclude the valid adoption of new national legislation measures to the extent to which they would be incompatible with Community provisions.”

²⁰³ Ibid 198 p644

The supremacy of Community law is again expressed in the Court of Justice’s ruling as, “Every national court must, in cases within its jurisdiction, apply Community law in its entirety and protect the rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, prior to or subsequent to Community rule.”

3.3 THIRD SECTION: FRENCH DEPORTATION POLICY CONTROVERSY AND LEGAL ANALYSIS

3.3.1 First subsection: Build-up to Controversy

Despite being considered a model nation for human rights, France, with its 2010 repatriation policy, was only the latest actor to respond to an ongoing engagement with the ROMA ethnic group. The summer of 2010, in fact, did not even represent the first or most successful attempt at removing ROMA from France. Prior to the international controversy, France, in 2008 and 2009, respectively, deported about 8,500 and 10,000 ROMA; a majority of said persons leaving, according to the French government, left voluntarily with a government incentive package, called “welfare grants” of 300 euro per adult and 100 euro per child²⁰⁴²⁰⁵. The reason for the international backlash to a continued policy of removing persons from French borders who failed to achieve employment within a 3-month period was in response to a leaked memo from the French Interior Ministry. Though a legal analysis and presentation of this memo will be conducted, prior events in 2010 led to the development and deployment of this memo.

France, similar to most member-states of the EU, placed restrictions upon the freedom of movement granted to Romanian and Bulgarian citizens upon their respective states’ admission

²⁰⁴ Fitchner, Ullrich. Spiegel online “Driving out the unwanted: Sarkozy’s war against the Roma” 15 September 2010 <http://www.spiegel.de/international/europe/driving-out-the-unwanted-sarkozy-s-war-against-the-roma-a-717324.html>

“France has repeatedly deported the Roma for years. Almost 10,000 were ejected last year, and 8,500 in the year before that.”

²⁰⁵ Simons, Stefan. Spiegel online, “Sarkozy finds a scapegoat: France begins controversial Roma deportations” 19 August 2010 <http://www.spiegel.de/international/europe/sarkozy-finds-a-scapegoat-france-begins-controversial-roma-deportations-a-712701.html>

“France’s policy of repatriating Roma isn’t new. Last year, the country sent some 10,000 Roma back to Romania and Bulgaria, with some 70 percent going willingly after being offered aid by the French government to resettle.”

into the EU on 1 January 2007²⁰⁶. With the ability to, “temporarily restrict the right of workers from Bulgaria and Romania under EU law on free movement to work,” France’s utilization of the transitional agreements of the free movement of workers from Romania and Bulgaria, demanding a work or residence permit for Romanians and Bulgarians wanting to reside in France for periods longer than three months, demonstrates France’s hesitancy towards allowing Romanians and Bulgarians in their society²⁰⁷.

This hesitancy only worsened after the summer of 2010. On 16 July 2010, members of the French police fatally shot a French Romani man who attempted to flee a police checkpoint²⁰⁸. This event led to a violent retaliation, initiated by the group “Gens du voyage”, or ‘French travelers’, in which numerous persons of French origin and ROMA attacked Saint-

²⁰⁶ European Commission. EURES The European Job Mobility Portal, “Free Movement: France” <http://ec.europa.eu/eures/main.jsp?acro=free&lang=en&countryId=FR&fromCountryId=RO&accessing=0&content=1&restrictions=1&step=2>

“During a transitional period of up to 7 years after accession of Bulgaria and Romania on 1 January 2007, certain conditions may be applied that restrict the free movement of workers from, to and between these member states.”

²⁰⁷ European Commission. Europa, “Commission report on transitional arrangements regarding free movement of workers from Bulgaria and Romania” 11 November 2011 [http://europa.eu/rapid/press-release MEMO-11-773_en.htm](http://europa.eu/rapid/press-release_MEMO-11-773_en.htm)

“They have been agreed in the Accession Treaty of Bulgaria and Romania and allow Member States to temporarily restrict the right of workers from Bulgaria and Romania under EU law on free movement to work in another Member State.

Their aim is to gradually introduce free movement for workers step-by-step over a seven-year period.

There are three phases (2+3+2 years) during which different, increasingly strict conditions apply as to the conditions under which Member States can restrict labour market access.

Member States may open their labour markets at any stage but must end restrictions at the latest at the end of the seven year period from January 2014.

The restrictions only apply to workers: they do not apply to the self-employed. Nor do they restrict the rights to travel and live in another Member State.”

²⁰⁸ Ibid 127

“In July, dozens of French Roma armed with hatchets and iron bars attacked a police station, hacked down trees and burned cars in the small Loire Valley town of Saint Aignan. The riot erupted after a gendarme shot and killed a French Roma, 22-year-old Luigi Duquenet, who officials said had driven through a police checkpoint, knocking over a policeman. Media reports suggested he had been involved in a burglary earlier that day. Duquenet's family dispute the police version of events, saying he was scared of being stopped because he did not have a valid driver's licence.”

Aignan²⁰⁹. Saint-Aignan's mayor described the attack as, "a settling of scores between the travellers and the gendarmerie (French police)"²¹⁰. The violence expanded in Grenoble as riots also developed in protest of the killing of 22 year old Luigi Duquet at the police checkpoint, leading to more persons shooting at and being shot by members of the French police; claiming they acted in self-defense, members of the French police returned fire and killed 27 year old French resident, Mr. Karim Boudouda²¹¹.

These acts of violence led to, "a government spokesman call[ing] Gypsies 'sources of illegal trafficking, of profoundly shocking living standards, of exploitation of children for begging, of prostitution and crime [within France]'"²¹². In addition to this strong opinion, President Nicolas Sarkozy announced, on 28 July, that ROMA camps were to be dismantled and their inhabitants, "systematically evacuated"²¹³. Furthermore, two days later, the French President, in response to the recent security concerns, publicly announced his position on the violent acts and the ROMA at Grenoble. President Sarkozy denounced the violent demonstrations against the police, stating the criminals actively endangered the lives of law

²⁰⁹ BBC. "Troops patrol French village of Saint-Aignan after riot" 19 July 2010.

<http://www.bbc.co.uk/news/world-europe-10681796>

"The riot erupted on Sunday morning in Saint-Aignan after a gendarme had shot and killed a traveller who had driven through a checkpoint, officials said. Travellers armed with hatchets and iron bars then attacked the village police station and hacked down trees. They also toppled traffic lights and road signs and burned three cars. "It was a settling of scores between the travellers and the gendarmerie," said the village mayor, Jean-Michel Billon. He said the travellers also pillaged a bakery in the village. Just 3,400 people live in the village in a popular tourist region of central France."

²¹⁰ Ibid 209

²¹¹ Ibid 209

"In separate rioting at the weekend, youths clashed with police in the Alpine city of Grenoble. Four men were arrested in a dawn raid on Sunday after they allegedly fired at police during a riot early on Saturday in the suburb of Villeneuve. The rioting was triggered by the death of 27-year-old Karim Boudouda, who was shot by police on Thursday during a chase."

²¹² Suddath, Claire. TIME World, "Who are Gypsies, and Why Is France Deporting Them?" 26 August 2010. <http://www.time.com/time/world/article/0,8599,2013917,00.html>

²¹³ Ibid 212

enforcement officers as well as the security of the surrounding communities²¹⁴. In order to better minimize the potential of further violent demonstrations, President Sarkozy stated he asked the Minister of the Interior to, "put an end to the wild squatting and camping of the Roma"²¹⁵.

In order to better defend the security of the nation, President Sarkozy also stated he would not accept the presence of an estimated 539 illegal Romani camps in France, promising the citizenry that half of the camps would be closed within three months²¹⁶. Despite the French government having already deported almost 20,000 ROMA over the previous two years prior to July 2010, this specific targeting of the unauthorized ROMA camps as, "sources of illegal trafficking, of profoundly shocking living standards, of exploitation of children for begging, of prostitution and crime," became the source of international attention²¹⁷.

By the end of August 2010, the Sarkozy government closed 51 ROMA camps and deported at least 1,230 non-French ROMA²¹⁸. To the Sarkozy government, all ROMA were targets. No matter if they were French ROMA involved in the disturbances at Saint-Aignan and Grenoble, or from Bulgaria and Romania with problems relating to alleged visa irregularities, all ROMA were targets for deportation²¹⁹. In order to enact national action against unauthorized ROMA camps, the Ministry of the Interior distributed a circular calling for the closing of

²¹⁴ Ibid 204

²¹⁵ Ibid 204

²¹⁶ Ibid 204

²¹⁷ Ibid 127

²¹⁸ BBC "French ministers fume after Reding rebuke over Roma" 15 September 2010.

<http://www.bbc.co.uk/news/world-europe-11310560>

"France has removed at least 1,230 east European Roma since July, accusing them of settling illegally."

²¹⁹ Ibid 2

"The French government says it plans to shut down 300 illegal Roma camps in the next three months. The controversial plan was put in place after clashes last month between police and travellers in the southern city of Grenoble and the central town of Saint-Aignan. The Roma were not involved in all of the trouble, but the government said travellers' camps were sources of "illegal trafficking" and "exploitation of children for begging, of prostitution and crime". Some 51 camps have already been demolished by police and the residents have been moved into temporary shelters or accommodation."

unauthorized immigrant camps and the deportation of those in violation of French law, work and residence visa requirements²²⁰. This circular, an official French government document, represents the center of controversy regarding the repatriation policy of 2010 as it, aligned with previous uncontroversial French policies of deporting illegal persons within French borders, stressed the importance of targeting ROMA camps and persons²²¹.

3.3.2 Second subsection: Analysis of the French ROMA Repatriation Policy

Despite French government claims that all illegal camps and unauthorized persons were being treated equally, a leaked government circular, dated 5 August 2010, states otherwise²²². This memo, originating from the Ministry of the Interior and later circulated to all French police chiefs (“Monsieur le Préfet de police, Monsieur le Directeur general de la police nationale, Monsieur le Directeur general de la gendarmerie nationale, Mesdames et Messieurs les Préfets – pour action”²²³), presents an ulterior motive in addition to the government’s desire to remove all unauthorized persons from France equally, “[the] leaked memo...signed by the chief of staff for

²²⁰ Willsher, Kim. The Guardian, “Orders to police on Roma expulsions from France leaked” 13 September 2010. <http://www.guardian.co.uk/world/2010/sep/13/sarkozy-roma-expulsion-human-rights> “Claims by the French government that it is not targeting Roma camps for destruction and deportations have been challenged by a leaked document suggesting police are following president Nicolas Sarkozy's orders. Critics of the controversial expulsions are examining the internal memo to establish whether it breaks international human rights laws on discrimination. The order, circulated to police chiefs last month as France began expelling nearly 1000 Roma Gypsies to Romania and Bulgaria, appeared to confirm the ethnic minority was being singled out. It comes as an embarrassment to immigration minister Eric Besson who, just a few days ago, said sending police to destroy camps and settlements set up by travellers from Romania and Bulgaria and ordering inhabitants to leave France was not aimed at the Roma.”

²²¹ Ibid 220

²²² Ibid 220

²²³ Ministère de l’Intérieur. Le Ministre de l’intérieur de l’Outre-mer et des Collectivités territoriales, “Evacuation des campements illicites” 5 August 2010. p1 http://www.lecanardsocial.com/upload/IllustrationsLibres/Circulaire_du_5ao%C3%BBt_2010.pdf

interior minister Brice Hortefeux, reminds French officials of [the] "specific objective" set out by Sarkozy",²²⁴.

This objective becomes readily apparent with a face value reading of the circular, employing the same standard used to initially analyze Section 2(b) of SB1070. The French circular, written to address the evacuation of the illicit, illegal, camps, states:

“Le Président de la République a fixé des objectifs précis, le 28 juillet dernier, pour l'évacuation des campements illicites: 300 campements ou implantations illicites devront avoir été évacués d'ici 3 mois, en priorité ceux des Roms”²²⁵.

In this statement, the Interior Ministry stresses that the President of the French Republic wants the precise objectives discussed on 28 July fixed. The objective: the evacuation of the 300 illicit, illegal camps or implantations to be completed within three months²²⁶. Though this does not suggest a targeting of specific groups, the following clause raises concern, “en priorité ceux des Roms,” that, “Roma camps are a priority”²²⁷. In the name of justice and maintenance of security, the circular stresses the importance of the President’s desire to remove the ROMA, as described in his 30 July 2010 speech in Grenoble²²⁸. This circular, a telegram of instructions, sets forth how to proceed in closing down and deporting those residing in the illegal camps, again stressing the priority of removing the ROMA²²⁹. In respecting the authority and legal limitations of the

²²⁴ Ibid 220

²²⁵ Ibid 223 p1

²²⁶ Ibid 220

²²⁷ Ibid 220

“300 camps or illegal settlements must be evacuated within three months.”

²²⁸ Ibid 223 p1

“Dans son discours de Grenoble, le 30 juillet dernier, le Président de la République a demandé de procéder d'ici la fin septembre au démantèlement des camps qui font dès à présent l'objet d'une décision de justice et, lorsque cette décision n'a pas encore été prise, d'engager les démarches pour qu'elle intervienne le plus rapidement possible.”

²²⁹ Ibid 223 p2

“Il revient donc, dans chaque département, aux préfets d'engager, sur la base de l'état de situation des 21 et 23 juillet, une démarche systématique de démantèlement des camps illicites, en priorité ceux de Rom.

government, the circular comments on how the police and national guard will help close the camps, again particularly those housing ROMA:

“Ces opérations constituent un engagement fort pris par le gouvernement afin de faire respecter l’autorité de l’Etat. Elles requièrent dès à présent une mobilisation personnelle complète de votre part et de tous les services, en priorité à l’encontre des campements illicites des roms. La démarche opérationnelle comprend notamment...l’engagement systématique, et sans délai pour les sites non présentement expulsables, de procédures judiciaires et de vérifications fiscales et sociales”²³⁰.

Urging that it is, “down to the préfet [state representative] in each department to begin a systematic dismantling of the illegal camps, particularly those of the Roma,”²³¹ this circular retains one purpose: despite the want and attempts to remove many illegal camps and persons from France, the top priority is to singularly target the ROMA.

If the aforementioned statements regarding the importance of removing the ROMA were not clear, the circular continues with four pages of tables regarding illegal persons in France – two pages dedicated to the state of illegal ROMA camps, the other two, the camps of all other illegal immigrants within France²³². This document represents the main insight into the Sarkozy government’s position regarding the repatriation of the ROMA. It demonstrates that the main goal, via the defense of national security and public health and safety, is to remove all illegal persons, particularly the ROMA, from France by any means necessary – expulsion through judicial, fiscal or social means.

Prior to the leaking of this governmental document, despite some concerns regarding the nature of the deportations, the EU and other major international actors failed to raise concern

Cela implique pour chacun des sites concernés de déterminer sans délai les mesures juridiques et opérationnelles pour parvenir à l’objectif recherché site par site.”

²³⁰ Ibid 223 p2

²³¹ Ibid 220

²³² Ibid 223 p4-8

regarding the French repatriation policy. In fact, the Sarkozy government even claimed to, “not target... Roma camps for destruction and deportations”²³³. Additionally, days before the leaking of the Interior Ministry’s circular, the immigration minister, Eric Besson, said that, “sending police to destroy camps and settlements set up by travellers from Romania and Bulgaria and ordering inhabitants to leave France was not aimed at the Roma”²³⁴. Minister Besson insisted his understanding of the government’s policy as, “[that the ROMA] were being treated no differently to other European Union migrants who do not meet France’s residency rules”²³⁵. In fact, the minister said, “France has not taken any measure specifically against the Roma [who] are not considered as such but as natives of the country whose nationality they have”²³⁶. To specify this statement, the Minister continued that France will, “maintain our policy of expelling illegal immigrants. This is not something new”²³⁷. Thus, to ensure the ROMA were not being specifically targeted, of the 5,000 Romanians and Bulgarians expelled by August in 2010, only 1,000 were ROMA²³⁸. Additionally, of the estimated 28,000 persons deported by France in 2010, the ROMA from Romania and Bulgaria alone, expelled during the month of August, accounted for roughly four percent of the year’s total repatriation²³⁹. This represents a significant

²³³ Ibid 220

²³⁴ Ibid 220

²³⁵ Ibid 220

²³⁶ Ibid 220

²³⁷ Willsher, Kim. The Guardian, “France’s deportation of Roma shown to be illegal in leaked memo, say critics” 13 September 2010. <http://www.guardian.co.uk/world/2010/sep/13/france-deportation-roma-illegal-memo>

²³⁸ Ibid 237

“However, the internal order, circulated to police chiefs last month as France began expelling nearly 1,000 Roma Gypsies to Romania and Bulgaria, appeared to confirm the ethnic minority was being singled out... “We will maintain our policy of expelling illegal immigrants. This is not something new.” He said 5,000 Romanians and Bulgarians had been expelled so far this year, compared with 10,000 in 2009.”

²³⁹ Worldwide Visa Bureau. “France cracks down on immigration – record numbers deported” 11 January 2012. <http://www.visabureau.com/worldwide/news/11-01-2012/france-cracks-down-on-immigration-record-numbers-deported.aspx>

portion, as Romanian and Bulgarian ROMA make up only a fraction of the total of ROMA persons residing in and being deported by France. With the total number of Romanian and Bulgarian ROMA repatriated for one month being higher than four percent of 2010's total repatriated persons, the French government was specifically targeting this group of ROMA. Regardless of whether or not they were disproportionately targeted and discriminated against, these ROMA were targeted due to their ethnicity in addition to their legal status within France.

Despite the treatment towards the ROMA, the French immigration minister expressed the French government's main intent of the repatriation policy. By admitting to an increase in deportations since August being in response to, "[the President's] demand to go ahead with the dismantling of all illegal camps," the minister established France's understanding of Community law and support for repatriation in that, "[the] free movement in the European area doesn't mean free settlement. What has been forgotten is that each of the European countries is responsible for its own national citizens"²⁴⁰.

Regardless of whether the ROMA are being treated no differently in the process of repatriation than other EU citizens – as all deported adults are given 300 euro incentives and transportation to their natural member-state country –the issue remains that ROMA are explicitly targeted prior to the process of repatriation, as expressed by the government circular.

Almost immediately upon the circular's release, calls against the French policy arose. As soon as the circular was released, the Group for Information and Support for Immigrants (Gisti) stated it would examine the memo to establish if it broke any criminal laws²⁴¹. In fact, Stephane

"France's interior minister Claude Gueant has revealed that the country deported a record 33,000 illegal immigrants in 2011 and that he wants to see this number, already a 17.5% rise from 2010, reach 35,000 in 2012."

²⁴⁰ Ibid 237

²⁴¹ Ibid 237

Maugendre, president of Gisti, stressed the law's targeting of an ethnic minority, "Can you imagine a circular specifically naming Jews or Arabs?"²⁴² Additionally, the then main opposition political party, le PS, the French Socialist party, also questioned the legality of the governmental circular and policy, claiming it represented a "xenophobic policy"²⁴³. In fact, Harlem Désir, a French Socialist MEP, demanded, "the European commission and its president José Manuel Barroso to initiate infringement proceedings against the French government to end the indignity and stigma unacceptable to the European citizens [the ROMA]"²⁴⁴.

Despite the numerous accusations and demands for EU action and inquiry into the controversy, the French government continued to claim it expelled people on legal and not ethnic grounds²⁴⁵. The government's focus and continued interest in the illegal ROMA camps and persons might be caused by the fact that ROMA account for an overwhelming majority of foreign persons erecting residence-camps in France, and that, "most Roma from the two countries [Bulgaria and Romania] are thought to be in France illegally"²⁴⁶. In fact, despite the direct written connection between the President and the ROMA expulsion policy in the leaked circular, President Sarkozy claimed his government was unaware of the Interior Ministry's directive, and that the government, upon becoming aware of its existence via press reports, prohibited the circular's ROMA directive²⁴⁷. Additionally, the French government stated that the

²⁴² Ibid 237

²⁴³ Ibid 237

²⁴⁴ Ibid 237

²⁴⁵ Hugues, Bastien. "Roms: à Bruxelles, Sarkozy maintient le cap"

<http://www.lefigaro.fr/politique/2010/09/16/01002-20100916ARTFIG00611-roms-a-bruxelles-sarkozy-maintient-son-cap.php>

²⁴⁶ Ibid 127

²⁴⁷ Ibid 245

"Pour étayer son propos, le chef de l'Etat a précisé qu'au total, 500 campements illicites ont été démantelés au mois d'août, tous après des décisions de justice». A 80%, les personnes concernées étaient des gens du voyage, pour la plupart d'origine française. «Ces chiffres démontrent qu'il n'y a eu aucune

ROMA repatriated during the August deportations overstayed their three-month residency limit, as granted by the EU, without meeting the requirements to legally remain²⁴⁸.

Even after the EU's attempts to deter France from continuing ROMA deportations, the French government maintained its repatriation policy despite mounting criticism from the EU, UN and other international actors. "The[deportations] were condemned by numerous human rights groups, Pope Benedict XVI, and...the United Nations Committee on the Elimination of Racial Discrimination asked France "to avoid" collective deportations of Roma",²⁴⁹. In response to the continued deportations, the political components of the EU took action. Even after a 9 September 2010 vote by the European Parliament, which passed a resolution by 337 votes to 245 demanding France to, "immediately suspend all expulsions of Roma", claiming the policy "amounted to discrimination," the French government maintained its deportation policy, circumventing Europe's central authority²⁵⁰. Though the MEPs' demands were not legally binding, the Parliament's action nevertheless showed the mass expulsions are prohibited and unwarranted under EU law, "since they amount to discrimination on the basis of race and ethnicity"²⁵¹. In addition to the demands given by the European Parliament, German MEP Martin Schulz, leader of the social group in the European parliament, said: "The country that

forme de discrimination ou de ciblage. Tout s'est passé sous contrôle du juge», a fait valoir Nicolas Sarkozy."

²⁴⁸ CNN Wire Staff. CNN, "France begins controversial Roma expulsion" 19 August 2010.

http://articles.cnn.com/2010-08-19/world/france.roma_1_roma-camps-romania-and-bulgaria-french-minister?_s=PM:WORLD

"Roma from Romania and Bulgaria are allowed free passage into France if they are European Union citizens. After that, however, they must find work, start studies, or find some other way of becoming established in France or else risk deportation. The French government said those Roma being expelled this week have overstayed the three-month limit."

²⁴⁹ Atwill, Nicole. The Law Library of Congress, "France: Deportations of Roma: European Commission Assesses Recent Developments" 4 October 2010.

http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402291_text

²⁵⁰ Ibid 237

²⁵¹ Ibid 237

gave us liberté, égalité and fraternité has taken a different, regrettable path today”²⁵². Despite the controversy’s backlash, the French government remains defiant in the face of international condemnation and the EU’s central authority.

Furthering the EU’s discontent over the continued French policy, the EU’s lead justice official, Viviane Reding, rebuked the French government and declared the deportation policy illegal. Ms. Reding, the European Commissioner for Justice, Fundamental Rights and Citizenship, declared she was, “appalled by a situation which gave the impression that people are being removed from a member state of the European Union just because they belong to a certain ethnic minority”²⁵³. Prior to the leaking of the Interior Ministry’s circular, two French government ministers informed the Commission that the deportation policy in no manner targeted specific groups of persons; however, upon the discovery of the 5 August circular, Commissioner Reding chided Paris, stating, “This is a situation [the targeting of an ethnic minority] I...thought Europe would not...witness again after the Second World War”²⁵⁴. The Commissioner went one-step further, warning the French government of the Commission’s eventual infringement proceedings, “I am personally convinced that the commission will have no choice but to initiate infringement proceedings against France”²⁵⁵.

The legal authority of the EU to oversee the implementation of its legislation and the Treaties, as discerned in the previous section, does not reside with the European Parliament but with the Commission. The Commission, as, “charged with upholding European law,” retains the power as EU’s executive to oversee member-states’ governments and policies that conflict with

²⁵² Ibid 237

²⁵³ EUBusiness, “EU threatens France with legal action over Roma ‘disgrace’” 14 September 2010. <http://www.eubusiness.com/news-eu/france-immigration.642>

²⁵⁴ Ibid 253

²⁵⁵ Ibid 253

Community law²⁵⁶. This oversight capacity, granted by the Lisbon Treaty due to the EU's supremacy power, allows the Commission to take action in cases regarding violations of Community law or areas of legislative powers enumerated to the EU. This precedent, established by *amministratores delle Finanze dello Stato v Simmenthal S.P.A.* and *Marleasing SA v La Comercial Internacional de Alimentación SA*, forbids national governments from introducing legislation or national provisions that conflict with the Treaties or Community law²⁵⁷.

In cases of member-states not fulfilling their obligation to abide by Community law and legislative acts, the Commission can bring grievances against a member-state before the Court of Justice of the EU²⁵⁸. Also, if the Commission believes a member-state violates a directive adopted under proper legislative procedure, in this case France violating the 2004 Directive of the Freedom of Movement of EU Citizens, it may enact a mandatory monetary fine upon the member-state²⁵⁹. Through this capacity, the Commission discovered France's immigration initiative in the wrong on two accounts: firstly, it "was breaking a 2004 law enshrining freedom of movement across the EU" as ROMA, from Romania and Bulgaria, are EU citizens; and secondly, that, "the EU's charter of fundamental rights outlaws discrimination on ethnic grounds",²⁶⁰.

²⁵⁶ Ibid 124

²⁵⁷ Ibid 198

²⁵⁸ Ibid 154 p108

"If the Commission considers that the Member State concerned has not taken the necessary measures to comply with judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

²⁵⁹ Ibid 154 p108

"When the Commission brings a case before the Court pursuant to Article 226 on the grounds that the Member State concerned has failed to fulfill its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances."

²⁶⁰ Ibid 127

The Commission, on 29 September 2010, announced its understanding of recent events. After analyzing evidence presented by Commissioners and government officials regarding the French policy, the Commission ruled that citizenship, and all rights granted, are guaranteed to all citizens of member-states and that these rights must be enforced by all governments, with the exception of the security of the nation and safety of public health and order²⁶¹. Furthermore, the Commission stated that:

“Recent developments in France have led to a detailed exchange between the Commission and the French authorities on the application of EU law on free movement of people. The Commission took note today of the assurances given by France at the highest political level on 22 September 2010 that

- Measures taken by the French authorities since this summer did not have the objective or the effect of targeting a specific ethnic minority, but treated all EU citizens in the same manner;
- The administrative instruction ("circulaire") of 5 August 2010 that was not in conformity with this orientation was annulled and replaced by a different instruction on 13 September 2010;
- The French authorities fully ensure an effective and non-discriminatory application of EU law in line with the Treaties and the EU Charter of Fundamental Rights.

The Commission noted equally that France reaffirms its commitment to a close and loyal cooperation on these matters. The Commission will pursue the exchange with the French authorities and is sending a letter to the French authorities with detailed questions regarding the practical application of the political assurances provided”²⁶².

The Commission ruled that France, despite its attempt to rectify the situation by removing the clause, “specifically the ROMA,” from its circular directive, still had not completely integrated the substantive safeguards of the 2004 Directive²⁶³. Thus, instead of taking legal action against

²⁶¹ European Commission. Europa RAPID – press release, “European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens” 29 September 2010. http://europa.eu/rapid/press-release_IP-10-1207_en.htm?locale=en

²⁶² Ibid 261

²⁶³ Ibid 261

“In order to provide legal certainty to Member States and EU citizens, in particular in controversial situations, it is of utmost importance that the procedural and substantive safeguards included in the 2004 Directive on Free Movement are fully and correctly transposed by and in the Member States. At this

France, whose Minister of the Interior claimed had no knowledge of the August circular and ensured it was, “annulled and replaced by an instruction of September 13, 2010, that did not target any specific groups,”²⁶⁴ the deportation of persons, including ROMA, was allowed to continue.

As previously stated, the Commission retains the ability to oversee and enforce Community law and the Treaties through legal means if the member-state is discovered to have enacted legislation in violation of Community law. The August circular clearly demonstrated that France was specifically targeting the ethnic minority ROMA; in fact, the circular represented written confirmation of the President’s verbal attacks and wish to remove the ROMA population. Because of the special conditions upon the freedom of movement of persons from Romania and Bulgaria, which remain in effect until 1 January 2014 in France, the ability to deport persons who fail to find employment, or those who cannot disprove they will become unreasonable burdens upon the state, is not in contradiction of EU law. Furthermore, France’s ability to deport persons in order to ensure the security and continued public health and order of the nation, as outlined by the 2004 Directive and used by Sarkozy as reasoning for the deportation policy on 30 July at Grenoble, is also legal by EU law²⁶⁵.

The targeting of the ROMA as an ethnic minority, however, as described by the August circular, violates the founding principles of the Treaty on the EU, the Charter of Fundamental

stage, the Commission considers that France has not yet transposed the Directive on Free Movement into national legislation that makes these rights fully effective and transparent. Therefore, the Commission decided today that it will issue a letter of formal notice to France requesting the full transposition of the directive, unless draft transposition measures and a detailed transposition schedule are provided by 15 October 2010. The letter of formal notice would be sent in the context of the October 2010 package of infringement procedures.”

²⁶⁴ Ibid 249

²⁶⁵ Ibid 149 p84

“The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health.”

Rights and the 2004 Directive. As described in the Directive, “member-states [must] implement the Directive without discrimination between beneficiaries of the Directive on grounds of...ethnic or social origin...membership of ethnic minority”²⁶⁶. This declaration only supports a founding tenant of the Treaty on the EU, that, “the Union is founded on values of respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of person belonging to minorities”²⁶⁷. Thus, no matter if the French government removed the clause dictating French police to specifically target ROMA, the circular’s intent remains a fact and a violation of EU law. The Commission, as granted by the Lisbon Treaty and the EU’s supremacy clause, possesses the ability to, and should, impose economic sanctions upon the French government for failing to completely implement the 2004 Directive, a fact the Commission admitted to in its 29 September 2010 assessment.

However, France’s inability to implement or recognized the 2004 Directive towards ROMA fails to represent the sole EU member-state to do so. In Germany, since the 1990s, ROMA have been denied asylum or some who were granted asylum were returned to their country of origin, despite potential dangerous situations awaiting them²⁶⁸. Of the estimated 170,000-300,000 ROMA in Germany, under 12,000 are believed to be from Romania²⁶⁹. However, similarly to the French episode, the ROMA, also from Romania, are being targeted as an ethnic minority:

²⁶⁶ Ibid 149 p86

²⁶⁷ Ibid 171 p11

²⁶⁸ UNHCR “World Directory of Minorities and Indigenous Peoples - Germany : Roma/Gypsies/Sinti” 2008. <http://www.unhcr.org/refworld/topic,4565c22529,458aa8ef2,49749d1b2d,0.html>

“In the 1990s Roma/Gypsies from the former Yugoslavia and from Romania and Bulgaria entered Germany as asylum seekers and many were returned to their countries of origin despite the dangerous situation awaiting them there. The 1992 agreement between the German and Romanian governments for the German-subsidized repatriation of Romanian Roma set a precedent for agreements with other East European countries.”

²⁶⁹ Ibid 268

“The criminalization of Roma and Sinti by the state and federal authorities continues despite denials. The pressure on the community is designed to make them move on and in so doing they lose rights to welfare, health care, education and housing. Roma/Gypsies usually do not have citizenship. Many long-term resident Roma in Germany only have temporary 'tolerated' status, or *duldung*, which provides a stop on expulsion and must be frequently renewed. It often includes restrictions on freedom of movement, access to employment and social assistance, depending on the particular state (Land).”²⁷⁰

Unlike France or Italy, Germany does not possess a large ROMA population. However, upon the arrival of about, “50 Roma from Romania,” who arrived near Kreuzberg’s Görlitzer Park in 2009, German police quickly “disperse[d] them; [the ROMA] were hunted from site to site until finally the families were flown back to Romania”²⁷¹. Similarly, “In Italy, on the outskirts of Rome, Roma camps were cleared out by the police last year”²⁷². The inclusion of ROMA, especially from Romania and Bulgaria over the recent six years, is testing the EU’s alleged principles of tolerance and multiculturalism. Though the ROMA do not represent the sole group of national or group deportations or repatriations, they are a directly targeted group by western EU member-states such as Germany, Italy and France.

The need to prevent further discrimination is paramount as the French deportation of persons, including ROMA, continued past the three-month period provided by the initial Sarkozy program. No matter if overwhelming public support persists for the deportation policy, in that 65% of French people initially supported the 2010 initiative, the people’s approval of an illegal policy fails to grant the discriminatory act legitimacy²⁷³. Also, if the EU wishes to be recognized

²⁷⁰ Ibid 268

²⁷¹ The Local. “Berlin’s unwanted Roma” 14 October 2010. http://www.thelocal.de/society/20101014-30499.html#.UWY3_atoRRE

“Germany does not have large Roma encampments to speak of, but when some 50 Roma from Romania set up camp in Kreuzberg’s Görlitzer Park last summer, police were quick to disperse them; they were hunted from site to site until finally the families were flown back to Romania.”

²⁷² Ibid 271

²⁷³ Ibid 127

as a promoter of human rights and fundamental freedoms, it must enact more extensive action than drafting a letter of complaint to France.

The legal precedent and political ability for the Commission to bring a case against France to the Court of Justice exists within the EU's framework, yet no legal action occurs. The French law continues, now currently under the presidency of the Socialist party²⁷⁴. Similar to the previous conservative government, President Hollande, who, "promised in his election campaign that while the dismantlement of illegal encampments would continue, satisfactory 'alternative arrangement would be offered,'" has yet to deliver substantial alternative arrangements and cease the deportation of EU citizens²⁷⁵. Though governed by a different political party, France uses the same defense for raiding unauthorized immigrant camps and deporting EU citizens, "Paris insisted there was no racist motivation in closing the camps, adding that the evicted Roma had overstayed the time they were legally allowed to stay in France"²⁷⁶. The continued deportation of EU citizens may act in complete abidance of EU law, but ROMA remain a targeted group of persons.

No matter if the specific declaration discriminating against the ROMA is no longer an active and expressed component of the French deportation initiative, the August circular remains a violation of Community law that must be reprimanded. Without taking legal action to prove the illegality and invalid nature of the discriminatory policy, the EU gives the French policy greater legitimacy. By failing to take action, the EU is allowing France to continue deporting persons without greater, and needed, oversight and EU sanctions to ensure the protection of the rights

²⁷⁴ Todd, Tony. France 24, "France dismantles Roma camps, deports hundreds" 8 October 2012. <http://www.france24.com/en/20120809-france-dismantles-camps-deports-roma-romania-lille-deportations-valls>

²⁷⁵ Ibid 274

²⁷⁶ Ibid 274

and freedoms of all EU citizens. The EU's Commission needs to treat this situation more seriously and better defend the human and EU political rights of Romanian and Bulgarian ROMA.

3.3.3 Third subsection: Why Specifically target the ROMA?

Similar to the US case study, France, in 2010, was nearing a national election. Many believe that President Sarkozy initiated his stringent deportation policy, with a strong emphasis on the ROMA, in order to win over the far-right vote²⁷⁷. Despite the initial significant popular support, 65%, for the initiative, a significant reason for why the ROMA were specifically targeted is because of their economic weakness and cultural identity clash with the French cultural identity²⁷⁸.

France, unlike other nation-states, interprets citizenship and national identity along political lines. The national identity's origin, attributable to its political revolution of 1789, clarifies French citizenship and identity as *jus soli*, that in order to reside within France and be French one must adopt and implement the nation's societal, cultural and political ideologies, as, "France's citizenship model is culturally monist, requiring foreigners to adapt"²⁷⁹. Only by

²⁷⁷ Ibid 274

"Sarkozy was also accused of taking a deliberately hard-line stance in a desperate bid to court France's significant far-right vote in the face of a difficult reelection campaign."

²⁷⁸ Ibid 127

²⁷⁹ Kriesi et al. *West European Politics in the Age of Globalization*. University Press, Cambridge, UK. 2008. Full text. p85

"France has for a long time been a country of immigration, and, due to its colonial past, there is a strong non-Western European component in its immigrant population...Because of its civic-territorial model of citizenship, descendants of immigrants automatically obtain French nationality, or at least they can still acquire it easily. At the same time...France's citizenship model is culturally monist, requiring foreigners to adapt."

embracing the French identity will persons be accepted into the nation and regarded as French²⁸⁰. From its revolution origin, French citizenship became more than a legal designation but a form of identity, a manner of life incorporated with the concept of political allegiance, personal and societal integration within the state²⁸¹. Due to its political, cultural and ethno-centric foundation, the concept of citizenship and national identity allowed the French identity to be inclusive and assimilationist in nature.

Because of the manner of the French identity's formation and recognition of common cultural and ethnic similarities, the understanding of outsiders, unwanted persons who did not embrace the French identity, arose. The created concept of outsiders, others, led to the fear of foreigners, xenophobia, which altered the focus of animosity between rulers of French territories towards those who were not 'French'²⁸². France, in order to establish who was 'French',

²⁸⁰ Brubaker, Rogers. *Citizenship and Nationhood in France and Germany*. Harvard University Press, Cambridge, Massachusetts. 1992. Full text. p40, 48-49

"Civil equality and political participation, though brought together by the French Revolution, are distinct components of modern citizenship, with ideological and institutional roots in different sociohistorical context."

"The Revolution left the individual face to face with the state...The crucial point about citizenship...is that an immediate, direct form of state-membership replaced the mediated, indirect forms of membership characteristics of the ancien régime...The strengthening of the state through the "immediatization" of membership depended, however, on the legal rationalization and codification of membership. To demand services from its citizens or to exclude or regulate noncitizens, the state had to be able to determine unambiguously who was and was not a citizen."

²⁸¹ Ibid 280 p40-41

"Citizenship is a general membership status. The citizenry coincides roughly with the permanent resident population of a state. Noncitizens are aliens or foreigners-generally, persons with no permanent connection to state or society...Citizenship is a status constituted by common rights and obligations, whatever their content, not by particular rights or obligations...Citizenship is [also] a special membership status. The citizenry is a privileged subgroup of the population. The distinction between citizens and aliens is not exhaustive...Citizenship is constituted by the possession and exercise of political rights, by participation in the business of rule, not by common rights and obligations. The conception of citizenship as a general membership status was a product of the struggle of centralizing, rationalizing territorial monarchies against the liberties, immunities, and privileges of feudal lords and corporate bodies."

²⁸² Ibid 280 p86,87

"The French Revolution dramatically enriched and transformed the legal and political meaning of citizenship and occasioned the first formal codification of state-membership by a Western territorial state. But it did not radically transform the criteria that distinguished French from foreigners. Citizenship had

embraced a *jus soli* society and forced persons who wished to remain within the state to embrace French culture, political and social ideologies. France, being a more global power, developed its more inclusive attitude towards identity in order to more readily and easily convert and introduce new, conquered peoples into a more manageable, universal, French collective²⁸³.

With the rise of France's global influence came the increase of persons and skilled labourers moving within the French empire and settling in France. This rise in foreigners, though culturally and politically French, led to a national debate in the 1880's over whether or not to maintain a *jus soli* national identity, or adopt a *jus sanguinis* form of identity²⁸⁴. France, with the radical reform of 1889, instituted a policy that adopted a more *jus sanguinis* influenced identity form²⁸⁵. Because of this, "a person born in France of a foreign father would no longer have the right to claim French citizenship at majority," thus instead of being considered French at birth, French-born offspring of foreign persons would have to, "apply for naturalization like any other foreigner, although... would be permitted to do so after satisfying a less stringent residence requirement than ordinary foreigners"²⁸⁶. Though having altered immigration standards and the sense of national identity, France, because of an increase in the immigrant population, re-evaluated how to address those entering the nation. In order to maintain a form of social

become a much more salient and significant status, but the question, "Who is French?" was answered...in the jurisprudence of the *parlements* of the ancien régime, in a manner combining the principles of birthplace, descent, and domicile...This understanding called for an inclusive definition of citizenship; the old criteria afforded an inclusive definition...the 1791 Constitution distinguished between *citoyens français* and *citoyens actifs*."

²⁸³ Ibid 280 p85,86

"The expansiveness of French citizenship vis-à-vis immigrants, we have seen, rests less on liberal naturalization policies and practices than on a system of *jus soli* that automatically transforms second- and third-generation immigrants into citizens...The problem to which the government responded by introducing and extending *jus soli* was ideological and political, not demographic and military...The decisive extension of *jus soli* in 1889 can be explained only with reference to a distinctively state-centered and assimilationist understanding of nation-hood, deeply rooted in political and cultural geography..."

²⁸⁴ Ibid 280 p94-95

²⁸⁵ Ibid 280 p94-95

²⁸⁶ Ibid 280 p95

cohesion and diminish xenophobic acts, the French governments attempted to assimilate foreigners into their own identity, making them become French after proving their loyalty to the French identity. However, despite the continued rise in immigration from across the world, the French natives still favoured immigrants originating from French colonies, persons educated as, and who were culturally, French²⁸⁷.

Similar to the US, immigration became a prominent and controversial political issue. Due to a growing presence of North African and Middle Eastern migrants in France, per the guest-worker program initiated in response to the Second World War, the French government enacted stringent immigration policies and ceased its guest-worker program in an attempt to stop the influx of immigrants during the 1960's and 1970's²⁸⁸. The French governments attempted to appease the national electorate, as a continued rise of foreign employment occurred in conjunction with a high level of natural citizen unemployment²⁸⁹. In fact, in 1974, the French government suspended labour migration and the permanent settlement plan offered during the guest-worker program initiative²⁹⁰. This plan, however, failed due to France's being a signing member-state and developer of the EEC (later the EC, then EU) as well as the Convention Protecting Human Rights and Fundamental Freedoms²⁹¹. Because France legally bound itself to European, or Community, law in addition to the Convention that established fundamental human rights for all persons within EEC member-state borders, the Council of State ruled that family reunification of migrants was a basic human right, finding that France, "contravened the

²⁸⁷ Ibid 280 p95

²⁸⁸ Geddes, Andrew. *The Politics of Migration and Immigration in Europe*. SAGE Publications Ltd, Thousands Oaks, California 2003. Full text. P54-56

"Economic recession led the French government to suspend labour and family migration in 1974 through two circulars."

²⁸⁹ Ibid 288

²⁹⁰ Ibid 288

²⁹¹ Ibid 119 p177,178

constitutional right to family life,” forcing France to open its borders again²⁹². Thus, France already dealt with controversial immigration policies in its recent history that conflicted with European initiatives and treaties. During the 1960’s and 1970’s, however, France was overruled in its limited interpretation of immigration and human rights. Unfortunately for the ROMA, France has not yet received as much centralized political and legal attention.

The French, from the 1950’s through 1980’s, perceived immigrants of non-French colonial or European ancestry as ‘bad’ immigrants, persons who should be expelled or not allowed to enter²⁹³. This perception of foreign, non-French immigrants could explain the popular support of deporting the ROMA. From the debate over national identity and national economy, the issue of immigration and nationality arose within the political agenda²⁹⁴.

A potential reason for the Sarkozy government’s decision to enact such a strict immigration policy could be that it reacted to the rise of French nationalist politics. The use of cultural issues by political parties in France, particularly the National Front Party (FN), altered French politics and forced immigration and national security to become forefront issues. Though the political potential of immigration has not increased over the past several decades, as demonstrated by an analysis of the French electorate, “Martin (2000:256)... the share of [French] citizens who believe there are too many immigrant[s]... in France did not rise... between 1966 and 1993... [as they were] already a majority,” the FN still managed to manipulate the issue into becoming a paramount electoral issue²⁹⁵.

²⁹² Ibid 288

²⁹³ Ibid 288 p55

²⁹⁴ Ibid 288 p56

²⁹⁵ Ibid 288 p85

Due to the legitimization of the FN and the issue of immigration, the Sarkozy-led UMP government altered their political stance on immigration²⁹⁶. In order to counteract the rise of the FN, the UMP adopted a similar anti-immigration, culturally protectionist and exclusionist policy²⁹⁷. It is possible that the deportation policy enacted by Sarkozy in 2010 was a result of the UMP's altered political stances, in an attempt to regain a majority of the electorate's support. Though the government targeted non-authorized persons and EU citizens who failed to find employment in France after three months, the issue of culture and identity remain important, especially given the specific targeting of the ROMA. As expressed by the Sarkozy government, the ROMA were a threat to the security and public health of France. Because ROMA culture conflicts with French culture, and the fact that ROMA refuse to assimilate or accept French culture and identity, could represent another reason as to their being singled out by Sarkozy's government, in addition to their not finding employment.

The ROMA, an estranged element of the greater European populace, experience a rather primitive livelihood. Because of their cultural values and reluctance to fully include themselves within modern European state society, ROMA:

“Have a lower life expectancy (10 to 15 years lower than the European average), have a higher infant mortality rate, live in substandard conditions (described as “de facto ghettos” even in Western European states), face unemployment of up to 80 percent, and, in many instances, do not have access to healthcare or education”²⁹⁸.

The ROMA, who en masse possess limited education, usually require state support in order to survive, due to their poor living and employment conditions. In fact, in order to best illustrate their level of unemployment and the high likelihood of their being a burden on a state's

²⁹⁶ Ibid 288 p98

²⁹⁷ Ibid 288 p98

²⁹⁸ Ibid 129 p288

welfare system, “in 2006, 90 percent of all Roma in Bulgaria lived on state benefits”²⁹⁹. The perceived poor living conditions and economic shortcomings of the ROMA have led to many non-ROMA Europeans to view ROMA as an economic burden upon their state systems, and that, “being a Roma [is] a disadvantage: 77 percent of Europeans consider being Roma a disadvantage,” which stands in similar position to, “79 percent [of Europeans who] consider being disabled a disadvantage”³⁰⁰. Additionally, there are studies that show, “high rates of tuberculosis, hepatitis A and B, asthma,” amongst ROMA, as well as high rates of HIV and substance abuse³⁰¹. These instances of poor health and higher rates of disease and substance abuse only add to the negative stigma towards the ROMA by Europeans. Furthermore, of the ROMA currently living in Europe, “eight out of ten Roma are at risk of poverty; only one out of seven young Roma adults have completed upper-secondary education”³⁰². This, in conjunction with, “Forced evictions of Roma [being] the norm rather than the exception in...Romania, Italy, and France,” and, “education [being] segregated in the Czech Republic, Greece and Slovakia,”

²⁹⁹ Ibid 129 p288-289

³⁰⁰ Ibid 129 p289

³⁰¹ EPHA <http://www.epha.org/a/1599>

“The treatment of Roma, Gypsies and Travellers "has become one of the most pressing political, social and human rights issues facing Europe" according to a new European Commission report entitled "The Situation of Roma in an Enlarged EU". Examining the conditions Roma, Gypsies and Travellers face in a range of fields, including education, employment, housing and healthcare, the report sets out both good and bad practice in policies and programmes for Roma. There is limited data of information about the health status of Roma, Gypsies and Travellers communities in west and eastern European countries, but some studies show high rates of tuberculosis, hepatitis A and B, asthma. Poverty and discrimination are linked to trafficking of women and involvement in sex-work with associated exposure to HIV. Marginalisation creates vulnerability to addictions such as alcohol and drugs with weak public health structures to address these issues. Vaccination rates among children tend to be lower than among other populations.”

³⁰² Amnesty International. “Wake-up call for a giant: The EU must end discrimination against Roma” 4 April 2013. <http://www.amnesty.org/en/news/wake-call-giant-eu-must-end-discrimination-against-roma-2013-04-04>

demonstrates the seriousness regarding ROMA's current social, economic and political disadvantages³⁰³.

Many of the current ROMA hardships and perceived disadvantages are in reaction to "Gypsy law," ROMA culture and identity that prevents them from completely engaging and assimilating into other cultural and national identities³⁰⁴. Because of a lack of common language, religion, sense of identity in addition to the fact that the, "Roma are scattered throughout Europe—usually in hundreds of small, isolated, ghetto-like communities adjacent to villages and cities," the ROMA's diversity establishes a loose continuum of related subgroups that, with their common law, distance themselves from European cultures and values³⁰⁵.

Despite the differences between the ROMA communities, they all possess a unifying factor in that, "they operate under a similar normative code...[that] operates outside the parameters of state law"³⁰⁶. Though each group retains a different variation, common elements and similar moral codes maintain a form of Gypsy law is shared amongst all ROMA³⁰⁷. "The Gypsy legal system not only protects the Gypsy from external and internal threats, but also

³⁰³ Ibid 302

³⁰⁴ Ibid 129 p289

"These attitudes are responsible for the lack of political will toward Roma integration but are themselves partly a reaction to Gypsy law and culture."

³⁰⁵ Ibid 129 p290,291

"'The Roma constitute an extremely diverse minority,' and 'the Roma themselves do not (yet) make up a homogenous ethnic group. Rather, the Roma today are a continuum of more or less related subgroups with complex, flexible, and multilevel identities'."

³⁰⁶ University of California Press. 2013. <http://www.ucpress.edu/book.php?isbn=9780520221864>

"For centuries the Roma have survived by using defensive strategies, especially the absolute exclusion of *gadje* (non-Gypsies) from their private lives, their values, and information about Romani language and social institutions."

³⁰⁷ Ibid 129 p294

"'Romani systems of the administration of justice vary from each other just about as much as is humanly conceivable, even though different groups mostly have similar moral codes.'" Because Roma legal tradition is oral, variations in normative proscriptions and prescriptions across groups are understandable, but the main principles of Gypsy law are arguably shared."

serves as a code that organizes Gypsy society”³⁰⁸. Thus the Gypsy law evolved as a potential defense mechanism, “evolved to insulate Gypsies from the host society”³⁰⁹. From this defense mechanism against cultural and identity integration arises a, “deep mistrust toward *gaje* (... all non-Roma) [and] ‘disdain for the non-Gypsy world,’ [a perceived Gypsy] cultural superiority, and [a Gypsy] entitlement to treat *gaje* as lesser people”³¹⁰³¹¹. This is the case especially as, “Gypsy law is self-contained and cannot incorporate rules of a foreign legal system. The *gaje* legal system is equally insular so far as Gypsy law is concerned”³¹².

Interestingly, the French and ROMA share a common distrust of others, outsiders who do not embrace or share their culture. Both groups perceive their established identity as proper, and compatibility with other cultures remains difficult. In fact, because ROMA believe that, “their own law is the only true law,” they often, “do not comply with the laws of the host country and often violate the host country’s theft and fraud laws,” as theft and fraud are not considered crimes if committed against *gaje*³¹³. This is the case because, “The Gypsy believe they should approach and respond to the *gaje* with caution” as they are not to be trusted with their modern values and civic codes³¹⁴. Due to the ROMA’s perception of their law’s superiority, it is difficult for them to integrate themselves into the host country’s legal framework, national identity and

³⁰⁸ “Gypsy Law” <http://larp.com/jahavra/gypsylaw.html>

³⁰⁹ Ibid 129 p294

³¹⁰ Ibid 129 p294

An additional reason to why the ROMA (Gypsy) people distrust outsiders, others, is that, “*Gaje* are seen as categorically impure and, therefore, to be avoided. The Gypsies generally view the *gaje* as having no sense of justice or decency...Furthermore, not only do the Gypsies consider non-Gypsies polluted, they also believe that Gypsy names and rituals lose their magical effectiveness if uttered to *gaje*.”

Consequently, the Gypsies believe they should approach and respond to the *gaje* with caution, especially if the *gaje* profess good intentions. ‘Under Gypsy law, theft and fraud are crimes only when perpetrated against other Gypsies’.”

³¹¹ Ibid 306

³¹² Ibid 308

³¹³ Ibid 129 p295

³¹⁴ Ibid 308

culture. As the French also regard their national identity and citizenship highly, the ROMA could represent a disliked group as their cultural identity conflicts with and refuses to assimilate into the French culture despite the ROMA's continued presence within the identity-driven host country. This clash of cultures could represent an explanation of the discriminatory policy's origin as well as the French populace's approval for deporting the ROMA³¹⁵. No matter the rationale or reasoning behind the formulation of the 5 August 2010 circular initiative, the French government violated EU law by targeting an ethnic minority and should be held accountable.

³¹⁵ Ibid 127

4.0 THIRD CHAPTER – COMPARATIVE ANALYSIS OF CONTROVERSIAL POLICIES

4.1 FIRST SECTION: COMPARATIVE ANALYSIS

Despite the differences between the two political and geographic systems, both case studies and their centralized political entities demonstrate that immigration policy remains a highly contentious and controversial issue. Though the American model is situated within an entirely federal political and judicial model whilst the European case operates within a more intergovernmental, confederate political model, both systems face member-states circumventing central authority by violating constitutional jurisdiction or tenants of Community law by dealing with immigration.

Systems of checks and balances exist in both systems in order to counteract such violations of central authority. In the US, the first article of the Constitution establishes the federal government's supremacy. In the EU, judicial precedent and an added protocol to the Treaty of Lisbon establishes the EU's supremacy and jurisdiction over centralized European affairs, in addition to its ability to oversee and preempt member-state law that conflicts with Community law. Though this shared supreme power should deter or make specific member-state action illegal, the political systems' differences may establish why the EU is less capable of implementing its supremacy and adequately addressing its immigration controversy.

The supremacy and federal government's ability, in the US, to preempt member-state laws, through executive and judicial means, far exceeds the strength and capacity of the EU. As granted by the Constitution, the US' executive branch, with its extensive bureaucracy, retains the power and ability to implement and oversee the execution of federal laws and rulings, including legislation passed by Congress and Constitutional rulings by SCOTUS – the power of Judicial Review, a non-Constitutional power that SCOTUS granted itself in *Marbury v Madison* [1803]^{316,317}. With roughly four millions persons comprising numerous departments that specialize in specific policy areas, the US federal government's executive branch's bureaucracy possesses the economic and man power resources to ensure the upholding of the Constitution and federal laws³¹⁸.

In contrast to the US, the EU's lack of complete centralized authority and jurisdiction, despite the Commission's role as the EU's executive branch, demonstrates the centralized body's diminished capacity to enforce Community law. The Commission, similar to the US' executive branch, possesses the power and influence over the member-state governments and their policies

³¹⁶ The White House. The White House, "Executive Branch" 2013. <http://www.whitehouse.gov/our-government/executive-branch>

The executive branch of government, "Is responsible for implementing and enforcing the laws written by Congress and, to that end, appoints the heads of the federal agencies, including the Cabinet... The Cabinet and independent federal agencies are responsible for the day-to-day enforcement and administration of federal laws. These departments and agencies have missions and responsibilities as widely divergent as those of the Department of Defense and the Environmental Protection Agency, the Social Security Administration and the Securities and Exchange Commission. Including members of the armed forces, the Executive Branch employs more than 4 million Americans."

³¹⁷ Cornell University Law School. Legal Information Institute, "Judicial Review" 2013. http://www.law.cornell.edu/wex/judicial_review

"Judicial review is the idea, fundamental to the US system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch. Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the constitution. Judicial review was established in the classic case of *Marbury v. Madison*, 5 US 137 (1803)."

³¹⁸ Ibid 316

because it, “is charged with upholding European law”³¹⁹. This ability is granted by the Lisbon Treaty, which allows the Commission to, “ensure application of Treaties and measures adopted by the institutions pursuant to them,” as well as, “oversee the application of Union law under the control of the Court of Justice of the European Union”³²⁰. These powers, similar to those of the US’ federal executive branch, give the Commission the ability to enforce and regulate the treaties and all legislation or agreements recognized as carrying legal authority – such as the Charter of Fundamental Rights of the EU, Schengen *acquis* and 2004 Directive. Furthermore, though the Commission retains the ability to, “take initiatives to ensure the coordination of member-states’ social policies,” such as the member-states’ treatment of ethnic minorities and immigration policies, this oversight capacity is far more limited than the American counterpart³²¹. Without the needed manpower, economic means and judicial authority, as granted by SCOTUS’ judicial review, the Commission and Court of Justice of the EU cannot adequately hold member-states accountable for violations of Community law. This inability is exemplified by the EU’s greatest punitive measure to deter member-states from violating Community law and the Treaties: the Commission’s ability to bring legal action against a member-state to the Court of Justice of the EU, during which, if the member-state is found guilty, the Commission and also the Court of Justice may enact only a monetary fine³²².

³¹⁹ Ibid 3

³²⁰ Ibid 171 p19

Article 9D – The Commission

³²¹ Ibid 171 p48

Article 2D

³²² Ibid 171 p108

“When the Commission brings a case before the Court pursuant to Article 226 on the grounds that the Member State concerned has failed to fulfill its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.”

Without greater legal authority over the remaining sovereign policy areas of member-states, the EU will not be able to completely enforce or ensure the application of Community law and the Treaties. Because of this weak ability to defend Community law, France, for example, was able to specifically target an ethnic minority without facing staunch judicial penalties.

The EU, through its established legal authorities, retains some form of power and reprimanding abilities to deter current member-states from violating its central authority. Unlike the US' federal government and Department of Justice, the EU's Commission fails to treat the situation regarding the ROMA seriously enough. Though most of France's actions towards deporting ROMA remained legal within the Community Law's framework, which in itself seems contradictory against the EU's expression of heralding human rights, France did violate ROMA human and EU political rights upon targeting them specifically as an ethnic minority. In the US, the federal government engaged in legal action to federally preempt the controversial, and later discovered mostly unconstitutional, immigration policy. The Commission, however, allowed France to remove the controversial language and maintain its deportation of ROMA without expressing its targeting of the ethnic minority. Without a substantial political voice or electoral representation at the national or European level, the ROMA cannot adequately defend themselves against governments similar to France taking action against them. As France violated EU law and violated the ROMA's human right of freedom from discrimination, the EU, within its already established judicial framework, must enact an economic penalty upon France and other EU member-states that also violate the ROMA's human right of freedom from discrimination.

In order to better understand how the US was able to take legal action against Arizona when the EU did not, despite lack of political motivation, the largest difference between the

American and European models is the contrast between executive and judicial bodies' powers. Because of their varying structures, the Commission was less readily able to hold France accountable as the American federal government held Arizona. Through the courts and the powers of the executive and judicial branches in the American system, most of the controversial SB1070 state-legislation was preempted due to discovered unconstitutional elements.

With its extensive executive bureaucracy, the American federal government can ensure the implementation of judicial review by enforcing more than economic penalties upon the state of Arizona. Regarding France, however, the member-state still retains partial sovereignty and the EU does not yet possess complete jurisdiction over all policy matters in Europe. Because of this lack of authority, France, despite violating Community law, was less likely to face substantial legal punishment than Arizona. Furthermore, because of the EU's less clearly enumerated powers, the Commission had to establish evidence that France violated Community law by targeting the ROMA specifically; this process granted France the ability to remove language targeting the ROMA in order to ensure its deportation policy abided by Community law. Despite evidence indicating France's intent to target an ethnic minority, France's deportation policy remains in effect due to no legal action taken by the EU.

No matter the political differences between the two systems, the US and EU both face numerous additional actors committing violations of central authority similar to Arizona and France. In the US, a myriad of states enacted similar stringent immigration policies to SB1070; in fact, Indiana, Utah and Georgia also face federal judicial action, from Democrat and Republican appointees, which blocks their stringent legislation³²³. Other states, such as Alabama,

³²³ Wang, Marian. Propublica, "List of State Immigration Laws Blocked in Federal Court Grows Longer" 28 June 2011. <http://www.propublica.org/blog/item/list-of-state-immigration-laws-blocked-in-federal-court-grows-longer>

also enacted strict immigration policies. Even with the successful legal action against Arizona, the executive branch must enforce SCOTUS' ruling upon Arizona and similar state legislations in order to prevent violations of the equal protection clause.

In Europe, France does not represent the sole state actor taking action against the ROMA. Though France's aggressive deportation policy attracted the most international attention, "Albania, Bulgaria, France, Italy, Macedonia, Romania, Serbia, Slovakia and the UK" all enacted eviction policies that removed ROMA, according to the European Roma Rights Centre (ERRC)³²⁴. Not limited to deportations or evictions, actions against ROMA varied depending on the EU member-state: in Italy, authorities also evict ROMA³²⁵; in northern Romania, a town's authorities built a concrete wall separating ROMA from the rest of the town³²⁶; in Portugal, "the municipality of Vidigueira destroyed the water supply of 67 Roma (including children, pregnant women and elderly people)...After an intervention by ERRC, the authorities restored the water supply, but the reconnection was not made known to residents and living conditions remain

"Arizona and Utah both recently had key parts of their laws blocked by federal judges. Now, add Georgia and Indiana to the list...A federal judge in Georgia blocked the most contentious provisions of the state's new immigration law. The judge ruled that requiring police to check the immigration status of suspects who cannot produce identification amounted to "an end-run" around federal law. Another broadly written provision making it a crime to harbor or transport an undocumented immigrant was also blocked."

³²⁴ UNHCR, UN Refugee Agency. Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 - Roma*, 28 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fedb3e737.html>

"Roma continued to be targeted for ongoing evictions in other countries in Europe. According to the European Roma Rights Centre (ERRC), evictions were carried out during 2011 by Albania, Bulgaria, France, Italy, Macedonia, Romania, Serbia, Slovakia and the UK."

³²⁵ Ibid 324

"The Italian authorities have also been aggressive in pursuing a policy of evictions, affecting thousands of Roma in both Milan and Rome in recent years."

³²⁶ Ibid 324

"In northern Romania, the local authorities of Baia-Mare erected a concrete wall to separate a Roma community from the rest of the town. In response to criticisms of institutionalized racism and ghettoization, the mayor of the town claimed that the wall was to protect citizens against car crashes."

deplorable”³²⁷; in Serbia, police brutally assault ROMA³²⁸; in Hungary, ROMA are targeted by, “a far-right vigilante paramilitary group – ‘For a Better Future’”³²⁹; and in the Czech Republic, “Forced sterilization of Roma women remains an unresolved issue,” as “Roma women...still wait... for adequate redress for irreparable injuries two years after the Czech government under Prime Minister Jan Fischer expressed regret for individual sterilizations”³³⁰.

Each nation’s actions are deplorable and represent a violation of the ROMAs’ human freedoms and guaranteed rights as EU citizens. Though France’s targeting of ROMA is illegal, the state’s policy fails to represent the most offensive or barbaric criminal act against the ethnic group in the EU. Sadly, the Commission and other EU agencies have not brought similar, if not added, attention to the aforementioned targeting of ROMA as conducted with the French deportation policy. Dealing with the ROMA remains an arduous process as ROMA abide by mostly, if not only, their customs and laws, failing to address or abide by the customs and laws of host member-states. Despite the ROMA’s decision to live outside member-state law and potentially endanger the public order, safety and health of the nation, the ethnic group’s actions

³²⁷ Ibid 324

“In Portugal, the municipality of Vidigueira destroyed the water supply of 67 Roma (including children, pregnant women and elderly people) in February. After an intervention by ERRC, the authorities restored the water supply, but the reconnection was not made known to residents and living conditions remain deplorable.”

³²⁸ Ibid 324

In Serbia in June, Police Minister Ivica Dacic issued an official apology to a Roma family, four years after their son was brutally beaten by police in the eastern city of Vrsac. Police brutality is widespread in the country according to human rights groups.

³²⁹ Ibid 324

“In Hungary, Roma were targeted by a far-right vigilante paramilitary group – ‘For a Better Future’. The group deployed patrols in the northern village of Gyöngyöspata.”

³³⁰ Ibid 324

“Forced sterilization of Roma women remains an unresolved issue in some countries. Roma women in the Czech Republic are still waiting for adequate redress for irreparable injuries two years after the Czech government under Prime Minister Jan Fischer expressed regret for individual sterilizations.”

never grant a government or group of persons the ability to abuse or deny their granted protections and human rights.

With a large number of states, in the US and EU, adopting, or having already adopted, controversial immigration policies or strategies addressing immigrants, the issue of state sanctioned immigration policies acting contrarily to central authority is not an unusual occurrence. Whether or not this represents an attack on centralized authority and an undermining of international treaties, organizations and agreed upon fundamental human rights, France's deportation policy and Arizona's immigration policy contain both wrong and illegal components. Additionally, despite the stark contrast in the political systems' capabilities, the American federal and European evolving political system both failed to adequately deal with these issues. The EU, by failing to bring legal action against France and allowing xenophobic policies to continue, may lose international respectability and internal legitimacy. Both political unions must take greater legal and political action against these controversial policies in order to demonstrate their illegitimacy as well as illegal and unwarranted elements.

4.2 SECOND SECTION: POLICY SUGGESTIONS

In lieu of the comparative analysis, new policies and political powers for the US and EU must be suggested to better address the concerning issue of human rights violations and illegal actions taken by member-states circumventing central authority. Regarding the US, new policy suggestions will strengthen the federal government's authority and improve living conditions for millions of persons residing within the US; regarding the EU, an increase in central authority,

executive and judicial power must occur in order to ensure a more successful implementation and abidance of Community law and the Treaties by all member-states.

In the US case study, too many failed attempts at reforming or passing new immigration policies caused a rift between the federal government and states. Disturbed by the lack of successful action and modernization of policies to counteract evolving immigration problems in Congress, states felt the need to address immigration on their own. Resulting from the prolonged lack of, “federal comprehensive [immigration] legislation,” complaints surfaced articulating that, “the federal government has not satisfactorily stemmed the tide of illegal immigration”³³¹. Dealing with immigration individually, states enacted numerous policy standards, “creating an uneven patchwork of standards across the country”³³². The spectrum of state policies passed ranges from legislation to, “ease conditions for undocumented youth through granting access to in-state college tuition as well as public and private sources of financial aid,” to stringent laws similar to SB1070³³³. In all circumstances, the federal government’s lack of formulating and enacting successful immigration policy created the window of opportunity for Arizona to draft SB1070 in order to curtail illegal immigration.

Thus, the US’ first policy initiative must be to orchestrate a new and effective immigration policy. The format of this policy, however, remains open to debate as some argue that, “undocumented immigrants are an economic drain,” while others claim, “they are an economic boon”³³⁴. This debate is further demonstrated by the contention over undocumented workers and whether they claim jobs from natural citizens, or if they, “do work that Americans

³³¹ Lee, Brianna. Council on Foreign Relations, “The U.S. Immigration Debate” January 24, 2013. <http://www.cfr.org/immigration/us-immigration-debate/p11149>

³³² Ibid 331

³³³ Ibid 331

³³⁴ Ibid 331

are unwilling to undertake”³³⁵. Sadly, though many experts express legal immigration should be, “made more efficient to deter illegal immigration and attract skilled foreign workers,” it is believed the debate regarding the enforcement of anti-illegal immigration procedures, “has blocked progress on broader reform”³³⁶.

The need to pass immigration reform is great, especially as a majority of Americans believe the country’s immigration system, “is urgently in need of reform”³³⁷. Additionally, a Gallup poll from January 2012 discovered, “two-thirds of Americans are dissatisfied with the current level of immigration into the [country], with 42 percent of respondents saying it should be decreased”³³⁸. Whether the argument is to enact stronger illegal immigration enforcement policies or reform legal immigration policies and grant citizenship to the undocumented, unauthorized workers and their families who currently reside in the country, there remains substantial demand for policy reform from both state governments and the American electorate.

Interestingly, though much of the debate circulating illegal immigration regards immigrants entering from Mexico, recent studies by the Pew Hispanic Center, “show that migration flows between Mexico and the United States have been at net zero since 2007, primarily due to declining U.S. economic opportunity”³³⁹³⁴⁰. This trend, though recent, has not

³³⁵ Ibid 331

³³⁶ Ibid 331

³³⁷ Ibid 331

³³⁸ Ibid 331

³³⁹ Ibid 331

³⁴⁰ Passel et al. Pew Research Hispanic Center, “Net Migration from Mexico Falls to Zero-And Perhaps Less” 3 May 2012. <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>

“The largest wave of immigration in history from a single country to the United States has come to a standstill. After four decades that brought 12 million current immigrants—most of whom came illegally—the net migration flow from Mexico to the United States has stopped and may have reversed, according to a new analysis of government data from both countries by the Pew Hispanic Center, a project of the Pew Research Center. The standstill appears to be the result of many factors, including the weakened U.S. job and housing construction markets, heightened border enforcement, a rise in

yet arisen within the immigration reform debate. Because of the decrease in immigrant flow prior to laws such as SB1070, the need to enforce border security across the Mexican border does not appear as prevalent an issue.

Instead of simply focusing on the need to expel, deport or prevent entry of unwanted workers in the US, the federal government must better address the issue of unauthorized workers already present in the country. Within the new immigration policy, the federal government should decide to recognize the unauthorized workers already present within the US, those who have worked and contributed to the economy and nation. Instead of facing deportation, those present for years whilst abiding by state law, and who are employed, should be rewarded for their dedication and service to the host-state and country by becoming legal members of society. Thus, instead of focusing on, “an enforcement-heavy approach,” which only, “instills a culture of fear in immigrant communities,” the federal government should support, “comprehensive immigration reform that emphasizes streamlining legal pathways to citizenship in addition to enforcement policies,” such as an expansion of the DREAM Act³⁴¹. Though border security must be strengthened to prevent human and drug trafficking as well as further massive waves of illegal immigrants, undocumented workers as well as children of illegal immigrants already present in the US should be treated with respect and rewarded for their service and dedication to their host country. Additionally, granting a path to citizenship for these persons would be more cost beneficial for the US than deporting hundreds of thousands of persons.

The EU must address its immigration controversies differently. Instead of just reforming immigration policy, the EU, in order to best combat member-states that counter or violate

deportations, the growing dangers associated with illegal border crossings, the long-term decline in Mexico’s birth rates and broader economic conditions in Mexico.”

³⁴¹ Ibid 331

Community law, must improve and strengthen its central authority by garnering greater jurisdiction as well as political and judicial authority. With this greater authority, the Commission may overcome its political hesitancy of not engaging a member-state regarding human rights and EU political rights violations of an ethnic minority much of Europe dislikes. A potential solution to better protect the fundamental human rights and liberties of all EU citizens, including ROMA, in addition to better holding member-states accountable, is for the EU to look towards the US federal model. Despite retaining a supremacy clause and distinct enumerated powers that grant the EU the ability to enforce and regulate Community law and the Treaties, the EU is currently too weak to adequately uphold and enforce EU legislation whilst successfully sanctioning and deterring member-states from violating Community law.

To improve the EU's respectability and ability to defend and protect its citizens' rights, the EU should expand the Commission's executive bureaucracy and powers to resemble those of the US' federal government's executive branch. Additionally, the EU should grant the Court of Justice the power of Judicial Review, enabling it to determine the legality of state's legislation without direct cases from the Commission. Thus, with the power of Judicial Review, the Court of Justice could enforce greater punitive measures for Community law and EU legislation violations than simple economic fines as well as circumvent the Commission's lack of interest or political will to bring a case against France to the Court of Justice. By also possessing a stronger, larger executive, the EU would better ensure the Court of Justice's rulings be enforced upon the member-states. Without a bureaucracy similar to the American federal executive branch, the judicial rulings of the Court of Justice would be powerless and illegitimate, requiring member-states to implement rulings. If the EU had government agencies capable of implementing judicial verdicts, in addition to economic penalties, upon member-states who violate centralized

authority, Community law would be better protected. From this, the EU would gain legitimacy from its ability to enforce and defend its fundamental principles.

The likelihood of the EU's political system evolving to a more federal, centralized authority remains unlikely. Because member-states remain unwilling to relinquish sovereignty over specific issues and policy areas, as well as the want to retain national identities, the likelihood of the EU amassing the needed powers to better enforce and regulate its legislation and Community law remains minute at best. Though it may take decades to achieve this centralization of powers, if the Commission and Court of Justice were to acquire the aforementioned powers and responsibilities, the possibility of a member-state circumventing the EU's authority, similar to France's deportation of ROMA policy, would be considerably diminished.

5.0 CONCLUSION

After conducting legal and comparative political analysis of both case studies, Arizona's SB1070 and France's deportation of ROMA are considered illegal acts conducted by member-states circumventing their respective centralized political authority. Though both states' policies violated specific elements of US and EU law, both acted in the name of public health and security – common, good intentioned words used to justify their stringent immigration policies for the good of the many and the state. Though the EU grants member-states the ability to curtail human rights in order to protect the public health, public and national security of the member-state, neither the EU nor the US allows political actors to target specific minorities or groups of persons. Discrimination is strictly prohibited.

Furthermore, despite Arizona and France acting to preserve public health and security so as to protect the rights and safety of the many – by removing unauthorized workers, specifically targeting the unwanted ROMA, or trying to prevent human trafficking and crime being brought into Arizona from Mexico – their actions risk unleashing significant harm towards the few. In both case studies, unauthorized persons were explicitly targeted under the umbrella of good intentions initiated by member-states of greater centralized political organizations. Instead of simply targeting illegal immigrants, legal residents and citizens also suffered, proving the illegal and unjustified components of the respective policies. Regardless of the debate circulating the nature of human rights, whether they are universal guarantees or affordable luxuries in relation to

the continued security of the state, the fundamental human right guaranteeing protection against discrimination must remain absolute and not a diminishable freedom.

After too many conflicts centered on discrimination and the targeting of groups due to ethnic differences, we have and must continue to, through international treaties and national laws, ensure and protect the right to exist and remain free from discrimination across all ethnic identities. If we cross that line and discriminate against others, once we embrace xenophobia and curtail this entitled right, where do we stop? What justification or group's difference is off limits in order to protect the state?

We as a society and culture cannot use excuses to diminish or destroy certain groups' rights. In the 21st century, after previous calamities in human history when such excuses were used, we should all be beyond this. Human rights and fundamental freedoms should not be privileges or courtesies granted by the government and political actors, but guarantees continuously being enforced and protected.

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